No. 84-363-CFX
Status: GRANTED

Title: Northeast Bancorp, Inc., et al., Petitioners
v.
Board of Governors of the Federal Reserve System, et al.

Docketed:
September 6, 1984

Court: United States Court of Appeals
for the Second Circuit

See also:
84-754

Counsel for petitioner: Reycraft, George D., Millstein, Ira M.

Counsel for respondent: Solicitor General, Stock, Stuart C., Haines, John G., Pope, Wilmot T., Bellotti, Francis X., Tribe, Laurence H.

Entry	Date	Note	Proceedings and Orders
1	Sep 6 1984	G	Petition for writ of certiorari filed.
2	Oct 4 1984	G	Motion of Chase Manhattan Corporation for leave to file a brief as amicus curiae filed.
4	Oct 4 1984		Order extending time to file response to petition until November 8, 1984.
5	Oct 4 1984		Above extension applies to all respondents.
6	Oct 4 1984		Brief of respondent Connecticut, etc. in opposition filed.
7	Oct 12 1984		Brief of respondent Massachusetts in opposition filed.
8	Oct 16 1984		Opposition of Hartford National Corp., et al. to motion of Chase Manhattan Corporation for leave to file a brief as amicus curiae filed.
9	Nov 8 1984		Brief of respondents CBT Corporation, et al. in opposition filed.
10	Nov 8 1984		Brief of respondent Bank of Boston Corp. in opposition filed.
11	Nov 8 1984		Brief of respondent United States in opposition filed.
12	Nov 10 1984		Brief amicus curiae of New York filed.
14	Nov 14 1984		Reply brief of petitioners Northeast Bancorp., et al. filed.
15	Nov 14 1984		DISTRIBUTED. November 30, 1984
17	Dec 3 1984		REDISTRIBUTED. December 7, 1984
18	Dec 3 1984		REDISTRIBUTED. December 7, 1984
19	Dec 3 1984	X	Supplemental brief of petitioners Northeast Bancorp., et al. filed.
21	Dec 10 1984		REDISTRIBUTED. January 4, 1985
22	Dec 10 1984		REDISTRIBUTED. January 4, 1985
23	Jan 7 1985		Motion of Chase Manhattan Corporation for leave to file a brief as amicus curiae GRANTED.
24	Jan 7 1985		Petition GRANTED.
			**********
25	Feb 21 1985		Brief amicus curiae of Chase Manhattan Corp. filed.
26	Feb 21 1985	G	Motion of The David F. Bolger Revocable Trust for leave to file a brief as amicus curiae filed.
27	Feb 21 1985	G	Motion of The Bank of New York Company, Inc. for leave to file a brief as amicus curiae filed.
28	Feb 21 1985	G	Motion of New York State Bankers Association for leave to file a brief as amicus curiae filed.
29	Feb 21 1985	G	Motion of Alphonse M. D'Amato, et al. for leave to file a brief as amici curiae filed.
30	Feb 21 1985		Brief amicus curiae of New York filed.

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ntry	Date	Note	Proceedings and Orders
31	Feb 23 1985		Record filed.
32	Feb 23 1985		Certified original record & C.A. proceedings received. (3 boxes).
33	Feb 21 1985		Joint appendix filed.
34	Feb 21 1985		Brief of petitioners Northeast Bancorp., et al. filed.
35	Feb 21 1985		Brief of petitioner Citicorp filed.
36	Feb 21 1985		Brief amicus curiae of New York Clearing House Assn. filed.
37	Feb 21 1985	G	Motion of Frank L. Morsani for leave to file a brief as amicus curiae filed.
38	Mar 4 1985		Motion of The David F. Bolger Revocable Trust for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
39	Mar 4 1985		Motion of The Bank of New York Company, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
40	Mar 4 1985		Motion of New York State Bankers Association for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
41	Mar 4 1985		Motion of Alphonse M. D'Amato, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
42	Mar 6 1985	G	Motion of respondents Bank of New England Corporation, et al. for divided argument filed.
43	Mar 7 1985	D	Motion of petitioners Northeast Bancorp, Inc., et al. for divided argument filed.
44	Mar 18 1985		Motion of Frank L. Morsani for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
45	Mar 18 1985		Motion of respondents Bank of New England Corporation, et al. for divided argument GRANTED. Justice Powell OUT.
46	Mar 18 1985		Motion of petitioners Northeast Bancorp, Inc., et al. for divided argument DENIED. Justice Powell OUT.
47	Mar 15 1985		SET FOR ARGUMENT. Monday, April 15, 1985. (2nd case).
48	Mar 22 1985		Brief amicus curiae of Bob Graham, Governor of FL, et al. filed.
49	Mar 22 1985		CIRCULATED.
50	Mar 23 1985	X	Brief amicus curiae of Council of State Governments, et al. filed.
51	Mar 23 1985	X	Brief amicus curiae of Conference of State Bank Supervisors filed.
52	Mar 23 1985	X	Brief of respondent Connecticut, etc. filed.
53	Mar 23 1985	X	Brief of respondents Bank of New England Corp., et al. filed.
54	Mar 23 1985	X	Brief of respondent Massachusetts filed.
55	Mar 25 1985	X	Brief of respondent Board of Governors of the Federal Reserve filed.
56	Mar 23 1985	X	Brief amicus curiae of Fleet Financial Group, Inc. filed.
57	Mar 23 1985	X	Brief amicus curiae of Georgia filed.
58	Apr 3 1985	X	Reply brief of petitioners Northeast Bancorp., et al. filed.
59	Apr 8 1985	X	Supplemental brief of petitioners Northeast Bancorp., et al. filed.
60	Apr 11 1985	X	Supplemental brief of respondents Bank of New England Corp., et al. filed.

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Entry	Date	Note	Proceedings and Orders
61	Apr 15 1985		ARGUED.

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No. 84-

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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

JOHN BOYER
GREGORY SCOTT MERTZ
CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

Questions Presented

At issue in this case is the constitutionality of reciprocal Massachusetts and Connecticut statutes that permit local bank holding companies to offer full banking services throughout a multi-state region but exclude companies from states outside that region from offering such services anywhere in the region. The Federal Reserve Board has noted that these statutes, and the interstate compact of which they are a part, raise "issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country" (A37).* Board Chairman Volcker has stated that such state-established regional banking systems, created by multi-state compacts, would be a new form of Balkanization of the banking industry (A201).

Despite its admitted concern about the constitutionality of the Massachusetts and Connecticut statutes, the Board accepted their validity based on an "assumption of constitutionality" (A197). The Court of Appeals affirmed, expressly sustaining the constitutionality of those laws. The questions presented are as follows:

1. Has Congress authorized confederations of states to create interstate banking regions through multi-state compacts that permit full service banking within the region by bank holding companies located there, but boycott the bank holding companies located in states outside the region?

2. Absent authorization by Congress, does such Balkanization of interstate banking through regional compacts violate the Commerce Clause and the Compact Clause of the Constitution?

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* The Appendix to the Petition is cited as "(A——)."

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. The statement required by Rule 28.1 is extensive and is set forth at A1 to A20.

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No. 84-

IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

— *against* —

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on August 1, 1984, which affirmed: the order of the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board"), dated March 26, 1984, approving the merger of intervenor Bank of New England

Corporation ("BNE") and intervenor CBT Corporation ("CBT"); the Board's order, also dated March 26, 1984, approving the acquisition by intervenor Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru"); and the Board's order, dated May 18, 1984, approving the acquisition by intervenor Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial").

Opinions Below

The opinion of the Court of Appeals is not yet reported (A21-A33). The Board's order regarding the BNE-CBT transaction is reported at 70 Fed. Res. Bull. 374 (1984) (A34-A71). The Board's HNC-Arltru order is reported at 70 Fed. Res. Bull. 353 (1984) (A72-A78), and the Board's BBC-Colonial order is reported at 70 Fed. Res. Bull. 524 (1984) (A79-A87).

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1984 (A21-A33). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause (art. I, § 8, cl. 3) and the Compact Clause (art. I, § 10, cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Connecticut statute, 1983 Conn. Act 83-411 (Reg. Sess.); and a Massachusetts statute, Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984). These constitutional and statutory provisions are reproduced at A95 through A102.

Statement of the Case

1. *Petitioners.* Petitioner Northeast Bancorp, Inc. ("Northeast") is a bank holding company organized under Connecticut law. Its wholly-owned subsidiary, petitioner Union Trust Company ("Union Trust"), is a Connecticut bank that competes directly with banks owned by respondents CBT, HNC and Colonial, among others. On August 3, 1983, Bank of New York Corporation, a New York bank holding company, agreed to acquire the stock of Northeast subject to Board approval and passage of enabling legislation by the State of Connecticut and the federal government.

Petitioner Citicorp is a bank holding company with its principal place of business in New York. Through its bank and non-bank subsidiaries, Citicorp offers a variety of financial services to consumers and businesses in New York, New England and elsewhere in the country (A224-A225). However, because of the regional restriction provisions of the Connecticut and Massachusetts statutes challenged in this case, Citicorp is unable to offer full service banking in either of those states.

2. *The Bank Holding Company Act.* Congress has established a banking system in which the nation's banks and bank holding companies are subject to dual federal and state regulation. As part of this two-tiered system, Congress in 1956 enacted the Bank Holding Company Act (the "BHCA"), 12 U.S.C. §§ 1841 *et seq.*, which provides, *inter alia,* that a bank holding company[1] may not acquire a bank[2] unless the transaction has been approved by the Federal Reserve Board pursuant to specified competitive, financial and other standards. *See* 12 U.S.C. § 1842(a). Section 3(d) of the BHCA, 12 U.S.C. § 1842(d), commonly referred to as

1. A "bank holding company" is defined, for purposes of the BHCA, as a company that controls any bank or bank holding company. *See* 12 U.S.C. § 1841(a)(1).

2. In relevant part, 12 U.S.C. § 1841(c) defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

the Douglas Amendment, prohibits the Board from approving any acquisition of a bank located in one state by a bank holding company with its principal place of operations in another state, unless

> "the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

3. *The New England Compact.* Recognizing the current trend toward nationwide banking,[3] yet unwilling to expose its bank holding companies to the rigors of open competition, Massachusetts enacted the nation's first regionally restrictive interstate banking statute (the "Massachusetts Act") on December 30, 1982.[4] This law authorizes an out-of-state bank holding company to acquire control of a Massachusetts bank if:

> 1. the home state of the acquiring bank holding company grants reciprocal rights to Massachusetts bank holding companies (the "reciprocity provision"); and
>
> 2. the acquiring bank holding company is a "New England bank holding company"—that is, it has its principal place of business in Connecticut, Maine, Vermont, New Hampshire or Rhode Island and is not owned by a company with its principal place of business outside of those states or Massachusetts ("New England") ("the regional restriction provision").

According to its principal sponsor, State Senator John Brennan, the Massachusetts Act was specifically intended to exclude New York bank holding companies, in order to give local companies "the space to grow" (A189). In

3. *See, e.g.*, A170-A172 and A184.

4. Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (A101-A102).

summarizing a draft of the bill that eventually became the Massachusetts Act, the Research Staff of the Massachusetts House Committee on Banks and Banking noted that the purpose of the bill was:

> "to establish in the General Laws [of Massachusetts] the necessary authority for a regional, New England, banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority." (A150).

The Massachusetts Act could have no meaning without reciprocal legislation in some or all of the other New England states. To obtain such legislation, Senator Brennan convoked a meeting of bankers, regulators, legislators and others from the several New England states in February 1983, and embarked upon a campaign to convince other New England states to "join the Massachusetts plan and set up a real New England system" (A189; A162-A168).

Senator Brennan and his followers were successful in their efforts to obtain additional state regional interstate banking statutes. On June 8, 1983, Connecticut responded by enacting interstate banking legislation with reciprocity and regional restriction provisions modeled on the Massachusetts Act.[5] The legislative history of the Connecticut Act manifests in even greater detail the same concerted, exclusionary purpose as that of the Massachusetts Act.[6]

5. 1983 Conn. Act 83-411 (A97-A99). The Connecticut Act also provides that a bank holding company loses its status as a "New England bank holding company" if it or its parent acquires or establishes any bank that has its main office or principal place of business outside of New England.

6. *See, e.g.*, Conn. Sen. Debate (Statement of Senator Sullivan) ("[W]e thought that [we should act] to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking . . . in order to give our banks in Connecticut time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly can . . . .") (A159). *See also* Senate Debate (A160); House Debate (A157-A158).

On May 17, 1983, Rhode Island enacted similar reciprocal, regionally restrictive legislation (the "Rhode Island Act").[7]

The proponents of the New England Compact also attempted to persuade Congress to authorize regional interstate banking compacts. *See* Resolution of the Caucus of the New England State Legislatures (A161). Although United States Senator Paul E. Tsongas and United States Representative Barney Frank, both of Massachusetts, jointly sponsored a bill in Congress that would have given federal approval to such compacts (A190-A191), neither this nor other similar legislation that would have authorized state-created regional banking zones has been enacted.[8]

Under the New England Compact, bank holding companies from favored states may consolidate and control full service banks on an interstate basis, thereby increasing their capital bases, attractiveness to customers and general competitive strength (A234-A237). In contrast, non-New England bank holding companies—such as Citicorp and Bank of New York—are barred from controlling a bank in those states, regardless of whether their home states have enacted otherwise reciprocal legislation; and Connecticut, Massachusetts and Rhode Island companies—such as Northeast—are therefore unable to serve their shareholders and customers by combining with desirable non-New England firms.

The New England Compact has served as both a model and catalyst for the creation of other exclusionary regional compacts across the country (A230-A233). This unprecedented collective action is having a profound effect on the structure of the nation's banking system, as groups of states band together to partition the country into regional banking confederations.

4. *The Present Controversy.* New England bank holding companies quickly sought to take advantage of the Massachusetts and Connecticut Acts. On July 11, 1983,

7. R.I. Pub. Law S. 0661 Sub. A (A103-A106). The regional restriction provision of the Rhode Island Act expires on July 1, 1986.

8. *See* Statement of C.T. Conover, Comptroller of the Currency, Before the Committee on Banking, Housing and Urban Affairs (A206).

BNE, a Massachusetts bank holding company with twelve bank subsidiaries, and CBT, the largest Connecticut bank holding company, agreed to merge. Two months later HNC, another Connecticut bank holding company, agreed to acquire Arltru, the owner of a Massachusetts bank. And, in November 1983, BBC, a Massachusetts bank holding company and the largest such company in New England, agreed to acquire Colonial, the owner of a Connecticut bank.

In their applications to the Board for approval of their respective consolidations, BNE, HNC and BBC contended that the Connecticut and Massachusetts Acts authorized the Board to approve their transactions under the Douglas Amendment. As interested parties that would be injured by consummation of the proposed consolidations, petitioners each challenged one or more of these applications.[9] Petitioners contended that these statutes violate the Commerce Clause and the Compact Clause, and do not fall within the exception to the Douglas Amendment's general prohibition against interstate banking. Thus, petitioners contended that the Board lacked authority to approve these consolidations.

Conceding that it has no expertise concerning the constitutional issues raised in this case, the Board stated that it would approve the challenged transactions unless it found that the Massachusetts and Connecticut Acts were "clear-[ly] and unequivocal[ly]" unconstitutional (A41). The Board found that this novel standard of review had not been met and therefore approved the transactions; however, its specific findings directly support petitioners' position that the Massachusetts and Connecticut Acts are unconstitutional.

The Board recognized that the regionally restrictive Connecticut and Massachusetts Acts were enacted for purposes of economic protectionism (A57-A60). It also found

9. Citicorp challenged each of these applications before the Board. Northeast and Union Trust challenged the BNE-CBT application and were granted the right to intervene in the appeal from the HNC-Arltru order (A94). The Second Circuit subsequently consolidated the BBC-Colonial appeal with the appeal from the other two orders.

that this discrimination against interstate commerce was suspect because these statutes are not the product of unilateral conduct, but are part of an interstate compact that imposes these burdens on a multi-state basis (A51-A52).

Consequently, the Board declared that the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses unless they are saved by the Douglas Amendment (A58; A52). The Board also found that neither the terms of the Douglas Amendment nor its legislative history clearly demonstrates that Congress intended to allow states jointly to discriminate in the manner of the New England Compact.[10]

Given these findings, it is not surprising that the Board expressed serious doubts about its own decision.[11] Indeed, as Board Chairman Paul A. Volcker later advised Congress, the Board acted simply on an "assumption of constitutionality" when it approved the applications (A197); and, according to Chairman Volcker, the Board perceives "serious questions both about the constitutionality of such arrangements and their implications for public policy" (A199).

On review pursuant to 12 U.S.C. § 1848, the Court of Appeals affirmed. In rejecting petitioners' Commerce Clause contentions, the court assumed that the challenged state statutes are unconstitutional absent Congressional authorization. Although it cited no statutory language or legislative history that reflected such authorization, the Second Circuit concluded that the Massachusetts and Connecticut Acts were sanctioned by the Douglas Amendment (A31). With regard to the Compact Clause, the Court of Appeals did not dispute the Board's finding

10. The Board stated that "the Douglas Amendment does not appear *on its face* to authorize discrimination" (A65) (emphasis in original), and that the legislative history shows "no discussion of the power to discriminate among potential out-of-state entrants" (A66).

11. The Board's orders specifically recognized that its tentative resolution of the "fundamental and unique constitutional issues" inherent in multi-state arrangements such as the New England Compact was "not free from doubt" (A41; A83).

that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because it does not "increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States" (A32). The court failed to explain how the creation by a group of states of an exclusionary banking region could not have such effects, except to indicate its agreement with the Board's unsupported view that, by enacting the Douglas Amendment, Congress renounced all interest in the regulation of interstate banking (A29).

Reasons for Granting the Petition

The Court of Appeals has decided questions of critical importance to both banking institutions across the country and their federal regulators. Review by this Court is warranted because the Court of Appeals has rendered a decision that conflicts with past decisions of this Court and will open the door to state-created, regional Balkanization of a vital sector of interstate commerce. Prompt review is essential to avoid permanent harm to states and banking institutions injured by this new form of Balkanization, and to avoid serious disruption in the administrative functions of the Federal Reserve Board.

I. Whether States May Enact Regionally Restrictive Statutes That Create Exclusionary Banking Zones Is An Important Constitutional Question That Should Be Resolved By This Court

The straightforward but immensely important question presented in this case is whether groups of states acting in concert may, without Congressional approval, partition the nation into exclusionary banking regions, regardless of the effects of such action on the co-equal sovereign states that are barred from those regions and on the system of bank regulation established by Congress. As the Board has recognized, the decision in this case "will have effects far beyond the facts of the particular acquisition and

merger herein," and will affect the very structure of our nation's banking system (A251).[12] The Board explained that:

> "The regional interstate banking system developing in New England raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. The Georgia legislature has already passed a regional interstate banking statute, and there are proposals for regional banking systems in the Southeast (Florida and Georgia and a combination of other states as far north as Virginia), the Northwest (Washington, Oregon and Idaho), the Mid-Atlantic (New Jersey, Pennsylvania and several other states as far south as Virginia) and the Mid-West (several different regional groupings under discussion). Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation." (A37-A38).

In the map set forth on the following page, the Federal Reserve Bank of Boston graphically depicted these new

12. Recognizing the importance of banking to the national economy, this Court has not hesitated to review by writ of certiorari cases raising questions concerning the structure of the banking system. *See, e.g., Securities Industry Association* v. *Board of Governors*, —— U.S. ——, 52 U.S.L.W. 4962 (1984) (allowing bank holding company acquisition of "discount" securities brokerage affiliates); *Securities Industry Association* v. *Board of Governors*, —— U.S. ——, 52 U.S.L.W. 4943 (1984) (disapproving efforts by banks to underwrite commercial paper); *Bankamerica Corp.* v. *United States*, —— U.S. ——, 103 S. Ct. 2266 (1983) (permitting management interlocks between bank holding companies and competing insurance companies); *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46 (1981) (allowing bank holding company operation of closed-end investment companies); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (invalidating state laws discriminating against investment advisory and trust subsidiaries of out-of-state bank holding companies); *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) (disapproving bank operation of open-end investment companies).

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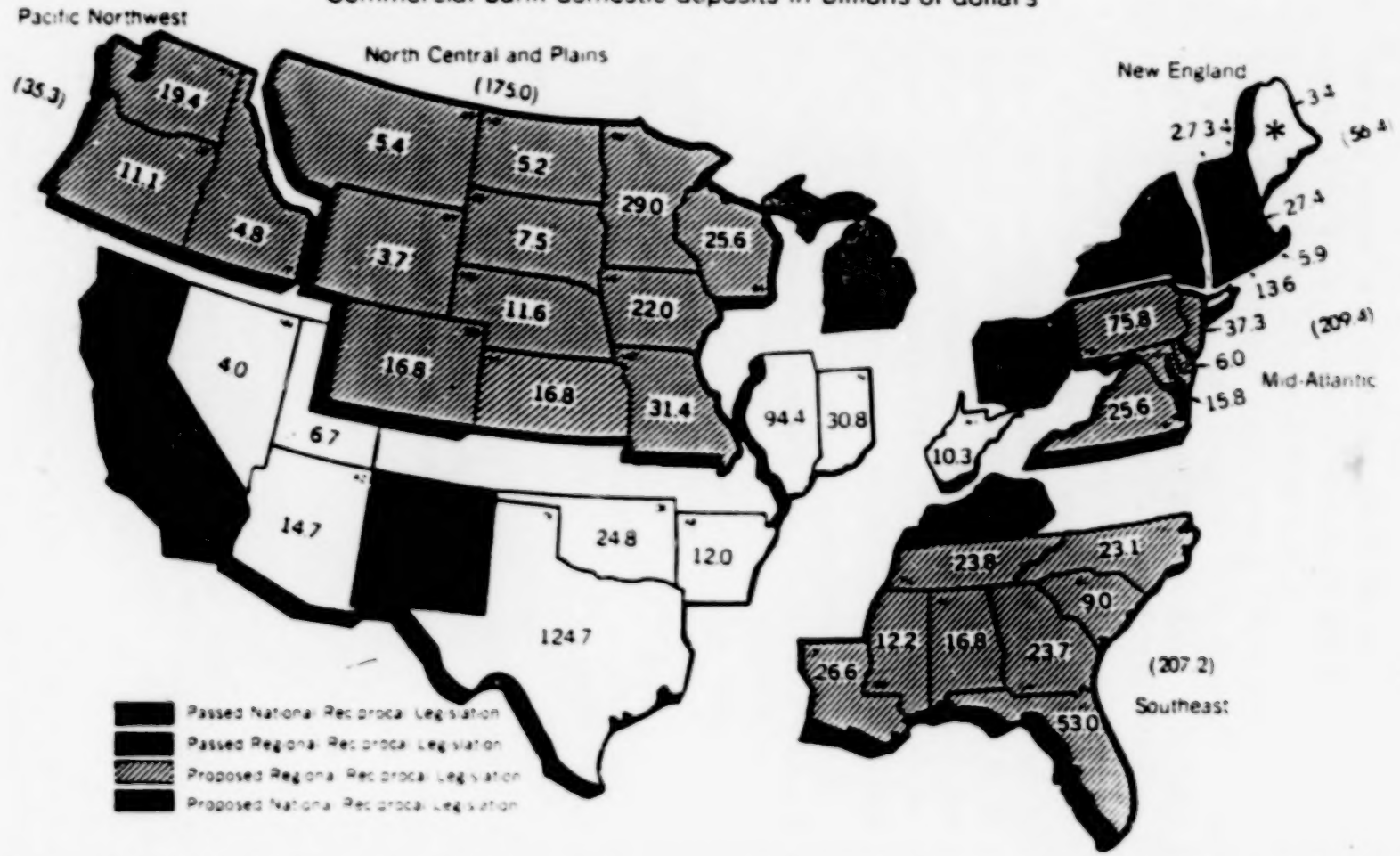
Proposed Interstate Banking Regions

Commercial bank domestic deposits in billions of dollars



*Maine passed a law in July 1975 allowing interstate banking with a reciprocal provision but that provision was rescinded on February 7, 1984.

Note: Alaska passed legislation in 1982 which allows interstate banking through holding companies on a national basis with no provisions for reciprocity. Georgia's legislature on February 13, 1984 passed a regional reciprocal interstate banking bill which is awaiting the governor's approval. Rhode Island's law provides for reciprocity in New England on July 1, 1984 and reciprocity in the nation to go into effect on July 1, 1986. This map only includes proposed interstate banking regions announced through mid-March 1984. Banking groups, state legislatures and other interested parties proposed these regions but they are not definitive. In fact, new ones are constantly being considered and proposed. Regional domestic deposits are shown in parentheses.

Source: Domestic deposit data as of June 30, 1983: Report of Condition Tape, FRS, FDIC, Comptroller of the Currency.

banking zones—all of which exclude the principal boycotted states, New York, Illinois, Texas and California. This Balkanizing process is proceeding apace: since the Board's March 26, 1984 orders were issued, Florida, North Carolina, South Carolina and Utah all have enacted additional regionally restrictive interstate banking statutes, and Georgia, Florida, North Carolina and South Carolina have established a new Southeast banking region (A232; A245).[13]

Besides the transactions challenged in this case, four other proposed acquisitions allegedly authorized by regionally restrictive interstate banking statutes have now come before the Board, and yet another acquisition has been announced (A244-A245).[14] One of those transactions, intervenor BBC's proposed acquisition of RIHT Financial

13. The rapid spread of this discriminatory legislation is illustrated by the statutes enacted and bills introduced between 1982 and 1984 in the state legislatures:

Region	*State Enacting or Considering Legislation*	*Principal States Boycotted*
Northeast	Connecticut (enacted) Massachusetts (enacted) Rhode Island (enacted)	New York, Texas Illinois and California
Southeast	Georgia (enacted) Florida (enacted) Kentucky (enacted) North Carolina (enacted) South Carolina (enacted)	"
Midwest	Iowa, Minnesota, Missouri Nebraska, Wisconsin	"
West	Arizona Oregon (enacted) Utah (enacted)	"

Ga. H.B. 1198 (1984); Fla. C.S.H.B. 795 (1984); Ky. H.B. 67 (1984); N.C. S.B. 706 (1984); S.C. S.B. 959, H.B. 3743 (1984); Or. H.B. 2149 (1983); Utah S.B. 9 (1984); Ariz. H.B. 2117; Iowa S.B. 512; H.B. 2113; Minn. S.B. 1837; Mo. H.B. 1239; Neb. L.B. 1069; Wis. A.B. 800.

14. Citicorp has challenged each interstate bank transaction that has come before the Board under the purported authority of a regionally restrictive statute.

Corporation, a Rhode Island bank holding company, was recently approved by the Board (A193). If the Second Circuit's decision stands unreviewed, numerous additional states will adopt discriminatory legislation, and other bank holding companies will seek to consolidate under such statutes in order to gain a competitive advantage.

As states hasten to create regional banking systems, certain states inevitably will be excluded. Such blatant discrimination will pit state against state, and has the potential to trigger retaliatory action in banking and other fields.[15] For example, the present controversy sets the political and economic interests of New York, the target of the exclusionary New England Compact, against those of its next door neighbors, Connecticut and Massachusetts. Governor Rice of the Federal Reserve Board has graphically described the discriminatory impact of this state legislation:

> "[T]he regional laws clearly discriminate against those states that are headquarters for the nation's largest banking organizations. None of the proposed regional zones would include New York. Utah's law allows reciprocal entry from Hawaii and all the Western states except California. Not surprisingly, the constitutionality of these laws is being challenged, and Board approvals of applications under the regional laws are being stayed pending court decisions. . . . These [laws present] difficult questions and their resolution by the courts may produce landmark decisions on states' rights and the national interest." (A202).

Nor is this discrimination against certain sister states the sole harm resulting from these banking compacts. By adding a third level of regulatory authority, the creation of

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15. *See Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 380 (1976) (parochial legislative policies can "open 'the door to . . . rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.'"), quoting *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935).

these state-established banking zones collides with the dual system of bank regulation established by Congress.

The regional banking pacts approved by the Second Circuit will also subject the nation's banking system to substantial confusion and mischief. The haphazard nature of the regional laws enacted to date has been noted by the bank regulators:

> "Inconsistencies are already developing as states select their regional partners. For example, the Georgia law would allow entry by Kentucky banks, but the Kentucky law only allows entry by banks in states immediately adjacent to Kentucky."

Remarks by Emmett J. Rice, Member, Board of Governors of the Federal Reserve System (June 21, 1984) (A201-A202). Such inconsistencies will lead to artificial divisions and unintended fragmentation of our economic system by the creation of sub-regions and other banking "districts" never contemplated by Congress.[16]

Moreover, the Board is currently forced to grapple with Bank acquisition applications without definitive guidance on the constitutionality of such laws, with no assurance that such laws ultimately will be upheld, and with the certainty only of continuous burdensome litigation. Without an authoritative resolution by this Court of the constitutionality of these regionally restrictive statutes, the Board will continue to struggle with such difficulties, and the parties will continue to litigate across the country.

Such widespread litigation would be extremely wasteful. Additionally, if another federal court of appeals or this Court later determines that such discriminatory leg-

16. These regionally restrictive statutes further impede the flow of commerce by frustrating the policies of other states. The Connecticut Act, for instance, extracts a high price from New England companies that desire to control a Connecticut bank. If they want to do so, they cannot own a bank in any non-New England state. *See supra* at 5 n.5. Thus, while, for example, Alaska has enacted a statute allowing a bank holding company from any state to acquire an existing Alaska bank (Alaska Stat. § 06.05.235), the Connecticut Act bars a New England company from acquiring such a bank if it wants to own a bank in Connecticut (A99).

islation is unconstitutional and therefore an impermissible predicate for interstate bank acquisitions, the only effective remedy would be to unscramble a substantial number of completed acquisitions across the country, at great cost to shareholders and public confidence in the banking system.

It is simply inconsistent with the concept of the federal Union established by the Constitution for confederations of states to establish preferential trade regions and regulate a vital portion of interstate commerce under a discriminatory regime that boycotts disfavored states:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366, 380-81 (1976), quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).[17] This reason in itself warrants review by this Court, as does the pointed conflict between the parties to the New England Compact and the states excluded by that arrangement. Such multi-state disputes are similar to original controversies before this Court—controversies that history has proven can only be resolved authoritatively by this Court.

The decision below also deals a heavy blow to Congressional policy. The Court of Appeals imputed to Congress an intent in the Douglas Amendment to confer upon state confederations the power to impose a pernicious form of discrimination. This is a serious misconstruction of Congressional intent. As the language of the statute and its legislative history establish, Congress never even considered the possibility of such concerted, regional discrimi-

17. *Accord* The Federalist Papers, No. 7 at 62-63 (Rossiter ed. 1967) ("Each . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent.").

nation, much less embraced it. *See infra* at 15-18. Moreover, the Second Circuit's view altogether ignores this Court's conflicting construction of the Douglas Amendment in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). *See infra* at 16.

II. Certiorari Should Be Granted Because The Decision Of The Second Circuit Conflicts With The Decisions Of This Court

The need for review of this case is highlighted by the failure of the Second Circuit to follow the decisions of this Court in deciding the constitutionality of these exclusionary regional banking arrangements.

1. The Douglas Amendment Does Not Authorize the Connecticut and Massachusetts Acts

The principal ground for the Second Circuit's decision was its "belief" that the Douglas Amendment authorizes any type of discriminatory banking confederation a state or group of states might choose to fashion. Significantly, the court was unable to adduce any statutory language or specific legislative history to support that belief.

That the Court of Appeals could find no support for this unprecedented result is hardly surprising. In passing the BHCA in 1956, Congress had no intention to grant the states unbounded power to restructure the nation's banking system in any way they pleased, to the detriment of other co-equal sovereign states and the Congressional dual system of bank regulation.

The language of the Douglas Amendment speaks solely to the statute laws of a single host "State," allowing it by the enactment of a valid law to lift the general ban on interstate bank transactions with regard to the acquisition of banks within that state. Congress' language does not in any way suggest that states were authorized to discriminate among their sister states, or to form regional alliances to promote local commerce while boycotting commerce from disfavored states. As this Court explicitly

recognized in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980):

> "Preliminarily, it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

(emphasis in original; footnote omitted). Thus the Board correctly found that:

> "[t]he Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states."

(A65) (emphasis in original).[18]

Like the plain language of the statute, the legislative history of the Douglas Amendment provides no indication that Congress intended to allow the states to discriminate among sister states or Balkanize the banking system by adopting exclusionary trade zones. As the Board expressly recognized, "[t]he Douglas Amendment was proposed during the debate on the Senate floor and there is no committee report or other significant legislative history to clarify its meaning" (A66).

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18. The ability of a state under the Douglas Amendment to lift the federal prohibition on interstate acquisitions does not provide such authorizaion, because it does

> "not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred."

Sporhase v. *Nebraska*, 458 U.S. 941, 959-960 (1982) (emphasis in original).

In enacting the BHCA, Congress was concerned with the scope of *its* prohibition, not with any state action that might be taken outside of that federal proscription (A66). It was simply not anticipated in 1956 that any state would permit its banks to be acquired by out-of-state bank holding companies.[19] The manner in which a state might elect to permit interstate banking was never even considered.[20] And Congress certainly never envisioned that groups of states might join together to restructure the banking system.[21] The legislative history of the BHCA in general is replete, however, with references to Congress' desire to

19. Representative Spence, the sponsor of the House bill, told Congress that he found no material difference between the BHCA, as amended by Senator Douglas, and the original House proposal, which would have totally prohibited interstate bank acquisitions. 102 Cong. Rec. 7165 (1956) (A118). During the Senate debate, Senator Bricker stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." *Id.* at 6861 (A112-A113). *Accord* Statement of Senator Capehart, *id.* at 6934 ("under the proposed legislation we are pretty much freezing the banking system of America") (A117); Statement of Senator Douglas, *id.* at 6860 (A111-A112).

20. Thus, with respect to the question whether discrimination among out-of-state bank holding companies had been authorized by Congress, the court in *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), stated that "[n]ot once in the entire debate is the . . . question raised." Similarly, the Board stated that there was "no discussion [in Congress] of the power of the states to discriminate among potential out-of-state entrants" (A66).

21. To the contrary, testimony before Senator Douglas' committee specifically emphasized that the proposed bank holding company legislation "maintain[ed] the autonomy of the *separate* states." Bank Holding Legislation: Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. 136 (1953) (A129) (emphasis added). Indeed, Congress expressly rejected proposals that would have authorized a "trade-area" or other regional approach to interstate banking. Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 Before the Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. 140 (1955) (rejecting suggestions to allow bank holding companies to operate under "a trade area approach such as a Federal Reserve district . . . .") (A120-A121). *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 203 (1955) (A132-A133).

assure that the statute was nondiscriminatory and did not favor any particular state or region.[22]

This Court repeatedly has held that an Act of Congress should not be construed to abrogate the limitations imposed on states by the Commerce Clause unless the federal law unmistakably authorizes the state conduct at issue. *See South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S.Ct. 2237, 2242 (1984) ("for a state regulation to be removed from the reach of the dormant Commerce Clause Congressional intent must be unmistakably clear").[23] Where no support for such an interpretation may be gleaned from the statutory language or legislative history, a state may only act in a manner consistent with the provisions of the Constitution—it may

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22. *See, e.g.*, 101 Cong. Rec. 8180-81 (1955) (Rep. Keating) ("It strikes me that if we are going to enact a bill, which I think we need, we should enact one that applies throughout the Nation and equally to all institutions") (A107); *id.* (Rep. Brown) (A108-A109); *id.* at 8184 (Rep. Smith) (A110-A111).

23. In *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), this Court declined to find Congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of Congressionally approved interstate compacts that demonstrated Congress' deference to state water law. This Court held that, if Congress intended to consent to the states' "unilateral imposition of unreasonable burdens on commerce," that intent would have been expressly stated. *Id.* at 960 (emphasis in original).

Similarly, in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982), this Court rejected the claim that state regulations inconsistent with the Commerce Clause were authorized by a provision in the Federal Power Act, reasoning:

> "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'"

not discriminate against or unduly burden interstate commerce.[24]

Similarly, the Compact Clause prohibits any interstate compact that would injure sister states or impair federal interests unless Congress has sanctioned that compact. *See, infra* at 24. Absent such authorization, the creation of such divisive, regional confederations is forbidden.

Under these standards, it cannot seriously be contended that in 1956—when it believed it was eliminating interstate banking altogether—Congress actually intended to allow confederations of states to partition the nation's banking system and adopt preferential trade zones in any way they might choose. If it had intended to abandon its authority so as to allow states to create such a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause,"[25] Congress certainly would have said so in a way that no one could mistake. It did not, and the Board so found (A66-A67).[26]

2. The Massachusetts and Connecticut Acts Violate the Commerce Clause

The Commerce Clause grants Congress authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has held that the "pur-

24. The Second Circuit mischaracterized petitioners' position, stating that it had "considered [and rejected] the argument that the Massachusetts and Connecticut statutes . . . must either permit all bank holding companies . . . to acquire their banks or permit none" (A29). Petitioners simply maintain that, in enacting interstate bank acquisition statutes, the states are subject to traditional standards governing discriminatory statutes—they may differentiate among bank holding companies, but only in a way that does not violate the Constitution.

25. *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 380 (1976).

26. Section 7 of the BHCA, 12 U.S.C. § 1846, referred to by the Second Circuit (A30), does not support the court's conclusion. That provision simply declares that the BHCA does not, of its own force, displace existing valid state banking regulations under the Supremacy Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

pose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Thus, while the Commerce Clause speaks in terms of powers bestowed upon Congress, it has been construed by this Court, since *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852), as also imposing limits on the power of the states to erect barriers against, or to impose burdens upon, interstate trade. This limitation is implicit in the Commerce Clause, which:

> "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes v. *Oklahoma*, 441 U.S. 322, 325-26 (1979).

This Court consistently has held that when state legislation is openly protectionist—that is, when it overtly discriminates against trade originating from a particular state or states in order to further local economic interests (or the interests of another group of states)—a *per se* rule of unconstitutionality will be applied.[27] When legislation promotes a legitimate state objective in an even-handed manner, the Court balances the state interests advanced by the law against the federal interest in unencumbered interstate commerce, and considers the duty of the state to further its valid interests with the least possible injury to interstate trade.[28]

The regional restrictions in the Connecticut and Massachusetts Acts violate the Commerce Clause under both

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27. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980), citing *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). The nation's banking system directly affects interstate commerce, and the establishment or acquisition of a bank in one state by a bank holding company in another state is itself a substantial element of interstate commerce. 447 U.S. at 38-39.

28. *E.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

the *per se* and the balancing tests. As the Board found, the statutes are *per se* invalid because they are blatantly protectionist measures that intentionally interfere with the domestic free market the Commerce Clause was designed to foster (A57-A58). The Board also found that, under this Court's decision in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Connecticut and Massachusetts Acts cannot withstand constitutional scrutiny even under the balancing test: "the disparate treatment of non-New England bank holding companies does not appear to be justified 'as an incidental burden necessitated by legitimate local concerns'" (quoting *Lewis*, 447 U.S. at 42) (A60).

Indeed, these statutes are *a fortiori* violations of the Commerce Clause because they do not constitute the action of a single state, but are part of a more objectionable arrangement by a group of states to discriminate against their sister states and form an insular banking region. This concerted conduct exacerbates the harm caused by the individual statutes and geometrically increases their burden on interstate commerce. Thus, the Board correctly recognized that the prohibitions of the Commerce Clause "are particularly applicable to state statutes that selectively confer benefits on one or more states" and deny those same benefits to other states (A56).[29]

In rejecting petitioners' Commerce Clause challenge, the court below assumed that the Connecticut and Massachusetts statutes violate these tests, but reasoned: "Congress may authorize the states to enact statutes which may interfere with interstate commerce. . . . However, congressional authorization must be clear" (A30) (citing cases). The court then held: "[w]e believe that by enacting the Douglas Amendment, the Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (A31).

While the Court of Appeals acknowledged the exacting standard that applies to this case, it failed to explain how

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29. *Accord Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939).

the Douglas Amendment provides the requisite "unmistakably clear" authorization. *See supra* at 15-17.[30] The court simply mentioned certain remarks by Senator Douglas during a floor debate which referred to the ability of the states to permit the entry of out-of-state bank holding companies "only to the degree that State laws expressly permit them," and which indicated that the Douglas Amendment paralleled the McFadden Act provisions concerning the power of national banks to branch intrastate and interstate (A28). Such isolated statements "are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause." Board Order, Appendix (A67).[31]

Moreover, these snippets from the floor debates do not suggest that the Douglas Amendment allows states to distinguish among bank holding companies in any manner they choose. Indeed, in referring to "them" generally (*i.e.*, to all "out-of-state bank holding companies"), Senator Douglas' statement, if anything, supports petitioners' view that the Douglas Amendment does not authorize discrimination among out-of-state bank holding companies in a manner that violates the Constitution.[32]

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30. As the Board recognized, *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), cited by the Second Circuit (A29-A30), "did not consider whether the alleged legislative authorization by the Douglas Amendment is express and unambiguous so as to sanction discrimination against interstate commerce that would otherwise run afoul of the Commerce Clause" (A69). *Iowa Bankers*, decided prior to this Court's decision in *Lewis*, involved neither the Commerce Clause nor the Compact Clause.

31. *See New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 ("Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.' ") (citation omitted); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

32. Nor does the McFadden Act, 12 U.S.C. § 36, support the Court of Appeals' position. That *federal* law was enacted to grant national banks a power they did not have—the power to branch. Any practical ability a state may have under the McFadden Act to govern banks relates only to banks within that state, and cannot be exercised in a discriminatory fashion. *See First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

The Court of Appeals also observed that "in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (A29). The argument apparently is that any state legislation allowing any interstate bank acquisition is, by definition, less burdensome than the total federal prohibition, and that the states therefore are free to impose whatever restrictions they might choose, no matter how discriminatory.

The Second Circuit cited no empirical evidence even suggesting that these regionally restrictive statutes promote commerce rather than restrict it. To the contrary, these reciprocal statutes dramatically restrict interstate commerce by boycotting the bank holding companies in the disfavored states, by inhibiting acquisitions by New England bank holding companies of non-New England banks, and by fragmenting the nation's banking system generally.

Moreover, any regional commerce purportedly fostered by restrictive state legislation is irrelevant when that legislation constitutes blatant discrimination by a group of states against co-equal sister states. The Second Circuit's opinion overlooks the principle of federalism embodied in the Commerce Clause. Neither logic nor Constitutional authority suggests that the ability of a state to permit commerce that otherwise would be federally prohibited is in any way equivalent to authority to discriminate against certain sister states. As consistently held by this Court, such a deviation from the federalist system established by the Constitution is *per se* unlawful as a violation of the very fabric of our Union. *See South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S.Ct. 2237, 2247 (1984).

The Court of Appeal's decision—which approves state-created Balkanization of the nation's banking system—directly conflicts with these well-established Commerce Clause principles.

3. The Massachusetts and Connecticut Acts Violate the Compact Clause

Under the Compact Clause,[33] any interstate compact or other arrangement that has the potential to increase the political power of the compacting states or otherwise encroach upon the exercise of federal authority is unconstitutional unless it has been approved by Congress. *See United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 468, 472 (1978); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).

Like the Commerce Clause, the Compact Clause embodies one of the fundamental precepts of our federal system of government. Deploring the chaos among the states under the Articles of Confederation, and the pattern of shifting alliances and dissension among the numerous German and Italian States of the period, the Framers of the Constitution decided to confer sovereignty in the United States upon only two entities: the individual states, with regard to their own internal affairs; and the federal government, with regard to matters of national concern. Between the individual states and the federal government, the Constitution left no room for any other sovereign, or for any regional confederation among the states.[34]

As the Board expressly found and the Second Circuit acknowledged, the reciprocal Massachusetts and Connect-

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33. U.S. Const. art. I, § 10, cl. 3.

34. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533-39 (1949); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 53-54 (1982).

The *Federalist Papers* demonstrate the grave concern of the Founding Fathers regarding interstate confederations. For example, Alexander Hamilton spoke specifically of the danger of "domestic factions and convulsions," and of "frequent and violent contests," arising from such "partial confederacies." *The Federalist Papers*, No. 6 at 54 (Rossiter ed. 1961). *See also id.*, No. 7 at 62-63; No. 8 at 66; No. 22 at 144. It was against this background of "sad experience" under the Articles of Confederation, that the Framers adopted the Compact Clause. Farrand, *The Framing of the Constitution*, 47-48, 153 (1976 ed.).

icut Acts,[35] which were the result of a series of meetings, discussions and other concerted activity,[36] constitute an interstate compact (A51; A32). Furthermore, as the Board found, despite the efforts of proponents of regional banking, Congress has neither expressly nor implicitly consented to the New England Compact (A52).[37]

Nevertheless, the Second Circuit rejected petitioners' Compact Clause argument, stating, without explanation, that it did "not think" that the New England Compact would "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." The court also noted that, "if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation."

This rationale plainly conflicts with the decisions of this Court. The protectionist, exclusionary New England Compact is intended to, and does, cause interstate divisiveness and antagonism, and acts as a barrier to harmonious, voluntary cooperation among the states within the federal Union. It prevents a uniform approach to interstate banking from which all states may benefit equally, and increases

35. The Board noted that the reciprocal "regional banking acts of Connecticut, Massachusetts and Rhode Island contain very similar provisions, and they were enacted within a six-month period . . . ." (A51). Such reciprocal legislation is in and of itself sufficient to constitute a compact. *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 470 (1978). *Accord* F. Frankfurter & J. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 735-48 (1925) (compiling list of compacts which included a number of statutes passed by two or more states establishing rights common to all the states involved). *See also Virginia* v. *Tennessee*, 148 U.S. 503, 517-518 (1893). The Second Circuit agreed that, in light of their legislative history, the challenged statutes "could be considered as part of a plan or compact to create a regional banking system" (A32).

36. *See* Board Order, Appendix (A51).

37. This is not surprising, since Congress refused to adopt a 1981 Presidential proposal to allow interstate bank acquisitions on a regional basis, *see Report of the President (1981)* (A134-A149), just as it rejected entreaties for a regional approach to interstate bank holding company expansion when it enacted the BHCA in 1956.

the economic and political power of member states to the detriment of the excluded states (A208-A221). As this Court stated nearly 150 years ago, the Compact Clause was designed to guard against precisely such a "derangement of [a state's] federal relations with other states." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838).[38]

The effort by the court below to limit the Compact Clause to narrowly-defined "political issues" is without support in the decisions of this Court. The Compact Clause guards against all forms of concerted state action that allow certain states to aggrandize themselves at the expense of other states or affect the ability of the federal government to govern matters within its purview.[39] Moreover, only a myopic interpretation of the word "political" would preclude recognition that the structure of the national banking system has important political implications.[40] In a society in which politics and economics interact so directly, the effort of Connecticut and Massachusetts to aggrandize themselves at the expense of other states is at its core a political act antithetical to the premise of our federal Union.[41]

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38. The Board correctly distinguished the New England Compact from the types of compacts that have survived constitutional challenge, because the latter "have not had the objective of discrimination but rather that of cooperation on a subject of exclusive interest to the states that are parties to these agreements" (A50). *See, e.g., New York* v. *O'Neill*, 359 U.S. 1, 6 (1959) (referring to such permissible compacts as "catalysts of cohesion").

39. *See, e.g., New York* v. *O'Neill*, 359 U.S. 1 (1959) (criminal justice); *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (taxation); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893) (state boundaries). *See also Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 379 n.13 (1976) (referring to the Compact Clause in a case involving regulation of the sale of milk).

40. *See* A208-A221; H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-3 (1955) (A132-A133).

41. *See* F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1976) (compacts which have a discriminatory effect upon non-party states "could be described as affecting

(footnote continued on next page)

Furthermore, the New England Compact does not just affect the balance of power among the states; it impinges on interstate banking, an area over which the federal government retains a "broad and comprehensive national authority . . . ." *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 303 (1935).[42] The New England Compact harms the interest and supremacy of the federal government in this field by creating a new level of regulation —the multi-state region—not provided for by Congress in its regulation of interstate banking; by boycotting substantial sectors of the national banking system; and by undercutting significant federal policy.[43] Thus, it can hardly be claimed that the Massachusetts and Connecticut Acts "neither project a new presence onto the federal system nor alter any state's basic sphere of authority." *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 469 n.21 (1978).

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the political balance of the federal system"); Hawke, *Are State Laws Permitting Interstate Banking Constitutional?* American Banker (A182):

> "In one old Supreme Court case involving the Compact Clause, the court, quoting Story's "Commentaries on the Constitution," indicated that the consent of Congress may properly be required for interstate 'treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty. . . .' *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). 'Balkanization' of banking through narrowly limited reciprocal-entry legislation could be seen as presenting such concerns."

42. As this Court has stated, the vital federal interest in interstate banking is apparent from the "impressive array of federal statutes, regulating not only the provision of banking services but the formation of banking organizations . . . ." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

43. For example, in order to facilitate the salvage of failing or failed banks, 12 U.S.C. § 1823(f), part of the Garn-St Germain Depository Institutions Act of 1982, allows the FDIC to arrange acquisitions of such banks by out-of-state bank holding companies. The Connecticut Act undermines that federal policy by prohibiting New England bank holding companies from acquiring any non-New England bank if they wish to control a Connecticut bank. Significantly, 12 U.S.C. § 1823(f) was set forth as a specific exception to the federal ban against interstate bank acquisitions in a 1982 amendment to the Douglas Amendment.

Despite the adverse impact of the New England Compact on excluded states and federal interests, the Second Circuit implicitly endorsed the Board's unsupported view that the compact is constitutional because, in enacting the Douglas Amendment, Congress somehow renounced all federal interest in interstate banking (A29). This assertion ignores the independent purpose of the Compact Clause to ensure that states do not join together to aggrandize themselves and injure their sister states. Even total renunciation by the federal government of its interest in the regulation of interstate banking could not justify an effort by states to combine against and injure other, co-sovereign states.[44]

Furthermore, far from abandoning the matter of interstate bank holding company expansion to the unfettered discretion of the states, the Douglas Amendment affirmatively articulates *federal* policy in this area—that there shall be no interstate bank acquisitions except as each state, acting individually, may through the enactment of a valid statute make exceptions with regard to the acquisition of banks within its own borders. Recently amended in 1982 to comport with federal policy on the acquisition of failing banks,[45] the Douglas Amendment demonstrates that the federal government has a paramount interest in regulating the interstate expansion of bank holding companies, an interest that has been impaired by the effort of New England states to create a regionally restrictive interstate banking system.[46] Thus, the Second Circuit was plainly wrong in holding that in 1956, without a single word to show its intent, Congress totally abandoned a

44. *See Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (Compact Clause intended "to guard against the derangement of [a state's] federal relations with other states of the Union").

45. *See supra* at 27 n.43.

46. The error in the Second Circuit's "renunciation" theory is confirmed by the fact that this case involves a petition for review of orders of a *federal* agency entrusted by Congress with approving bank acquisitions pursuant to Congressionally-established criteria.

critical field of interstate commerce to discriminatory Balkanization by the states.[47]

Finally, the Second Circuit erred in concluding that "if at any time Congress should find any encroachment it could remove the encroachment by appropriate legislation." This theory would authorize *any* compact—no matter how pernicious—simply because Congress could later invalidate it. That is not the law.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

JOHN BOYER
GREGORY SCOTT MERTZ
CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M SHAPIRO
MAYER BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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47. In contrast, when Congress chose to allow states to form regional compacts with regard to the transport of radioactive waste, it set forth in explicit terms its intent to authorize such compacts, and the terms upon which it would provide its approval. *See* 42 U.S.C. § 2021(b) *et seq.* (the Low-Level Radioactive Waste Act).

APPENDICES

APPENDIX A

Rule 28.1 Statement of Petitioners Northeast Bancorp, Inc. and Union Trust Company

Union Trust is a wholly owned subsidiary of Northeast. Northeast has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1. Union Trust has no subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.

Rule 28.1 Statement of Petitioner Citicorp

A.I.M. Bankers Nominees Senderian Berhad
Ace Pacific Navigation Co., S.A.
Addis Ababa Bank S.C.
Adela Investment Company S.A.
Administradora De Consorcios Crefisul Ltda.
Aeicor Inc.
AFC Holdings (Malaysia) Sendirian Berhad
Agricultural Finance Corporation Limited
Airship Industries Limited
Alpha Pacific Maritime Co., S.A.
Amicor Incorporated
Apetik-Refeicoes Convenio Ltda.
Argos Companhia De Seguros
Arrendadora Banamex, S.A. De C.V.
Arrendadora Y Administradora Citycol S.A.
Asean Finance Corporation Limited
Asfinco Singapore Ltd.
Asia Pacific Capital Corporation Limited
Asian International Merchant Bankers Berhad
Atena Inc.

Atlas Factoring Services Limited
Atlas Hire Purchase Limited
Atlas Leasing Limited
Aughnacloy Pty. Limited
Austraclear Limited
Automated Clearing Bureau (Pty.) Limited
Avrenim Catering Services Limited
Avrenim Leasing Limited
Baltic Exchange Limited, The
Banco Crefisul De Investimento S.A.
Banco De Desarrollo Del Paraguay S.A.
Banco De Guayaquil
Banco De Honduras S.A.
Banco Hipotecario De La Construccion
Banco Internacional De Colombia (Nassau) Limited
Banco Internacional De Colombia, S.A.
Banco Latinamericano De Exportaciones S.A.
Bancontact
Bangkok First Investment & Trust Limited
Bangkok First Tokai Company Limited
Bangkok Home Development Co.
Bangkok Nomura International Securities Co., Ltd.
Bank of Canton Limited
Banque Grindlay Internationale Au Zaire S.Z.A.R.L.
Banque Populaire De La Cote D'Or
Bard Discount House Limited
Bata Pacific Shipping Corp., S.A.
Bay Forest Lot 20
Birmingham Beagles Limited
Blackheath Cater Estates Limited
Boerum Court Associates
Brandts City Leasing Limited
Brandts France S.A.
Brandts Industrial Assets Limited
Brandts Nominees Limited
Brandts Second Nominees Limited
Brandts Woodpulp International Limited

Brickell Biscayne Associates
Brightfaith Navigation S.A.
Brinmex Trust
British Bank Of Commerce (Securities) Limited
Brother Industries, Ltd.
BT Publications, Inc.
Burr Ridge Club Co., The
Business & Finance Limited
Business Press Of Ireland Limited
Business Properties Limited
Bytex Holdings Limited
Cabinet Antoine Pouget & Cie "Diners Assurances"
Calais Resources Limited
Cambridge Credit Corp.
Caps Holdings Limited
Cardholder Services Limited
Caribbean Financial Services Corporation Limited
Carrigart Pty. Limited
Cedel, S.A.
Central Holdings Corporation
Centralian Holdings Limited
Channel Collections Limited
Chemelil Sugar Company Limited
Chiba General Lease Co., Ltd.
Citi-Reserve, Societe D'Investissement A Capital Variable
Citibank (Zaire) S.A.R.L.
Citibank Espana S.A.
Citibank Factoring Canada Limited
Citibank Leasing Canada Limited
Citibank-Maghreb
Citibelsa S.A.
Citicorp Bill Discounts Limited
Citicorp Capital Markets Australia Limited
Citicorp Chile Agente De Valores S.A.
Citicorp Finance And Securities
Citicorp Forex Limited

Citicorp New Zealand Limited
Citicorp Nominees Pty. Limited
Citicorp Y Rio—Banco De Inversion, S.A.
Citicrefisul S.A.—Sociedade de Investimento
Citifinance Limited
Citisecurities Limited
Citytrust Banking Corporation
Citytrust Realty Corporation
Clive Street Nominees Private Limited
Coho Resources Limited
Combro Limited
Command Studios Limited
Commonwealth Development Finance Company Limited
Commonwealth Oil Refining Company, Inc.
Community Hospitals P.L.C.
Compagnie Franco-American De Gestion Financiere
Companhia Brasileira De Entrepostos E Comercio
Compania Colombiana De Financiamentos Comercial, S.A.
Compania Exportadora Cityexport S.A.
Concord Company
Creation Group Limited
Creation Limited
Creation Printing Limited
Creative Press Limited
Credicard S.A.—Administradora De Cartoes de Credito
Credit Finance Corporation
Creekside Company
Crefidada S.A.—Processamento De Dados
Crefisul—Arrendamento Mercantil S.A.
Crefisul—Corretora De Seguros Ltda.
Crefisul—Previdencia Privada S.A.
Crefisul—Representacoes, Comercio E Participacoes Ltda.
Crefisul Distribuidora De Titulos E Valores
Mobiliarios S.A.
Crefisul Empreendimentos Imobiliarios S.A.
Crefisul S.A.—Credito, Financiamento E Investimento

D.C. The Credit Managing & Marketing Co., Ltd.
Dagnal Shipping Company Inc.
Dai-Fuji General Lease K.K.
Dainippon Ink And Chemicals, Inc.
Daiwa Mortgage Co., Ltd.
Data Type International Limited
Dearborn Park Corporation
Denvermoor Limited
Desarrollo Industrial, S.A.
Development Bank Of Singapore Limited, The
Development Bank Of Zambia, The
Development Finance Corporation Of Ceylon
DHC Corporation
Digital Computer Lease Inc.
Diners Club (N.Z.) Limited
Diners Club (S.A.) (Pty.) Limited
Diners Club Africa (1976) Limited
Diners Club Danmark A.S.
Diners Club De Chile S.A.
Diners Club De France S.A.
Diners Club De Panama, S.A.
Diners Club D'Italia S.P.A., The
Diners Club Du Maroc
Diners Club Israel Limited
Diners Club Limited
Diners Club Limited, The
Diners Club Limited, The (Ireland)
Diners Club Nordic A.S.
Diners Club Of Japan, Inc., The
Diners Club Peru S.A.
Diners Club Portugal S.A.R.L.
Diners Club S.A.L.
Diners Club Sweden A.B.
Diners Voyages S.A.
Diners World Travel Limited
Diners World Travel Ltd.—Greece
Diners World Travel Ltd.—Israel

Diners World Travel Pty. Limited
Dinshopping S.A.
Discor Investments (Private) Limited
Discount Company of Zimbabwe Limited
DNC Agency, Inc.
Dorchester On Rittenhouse Square Partners, The
Doyu Shoji, Inc.
Eagle II
East African Development Bank Limited
Edilistes S.A.R.L.
Efts Service Corporation
Efts Service Corporation II
Elk Grove Village Venture
Elogica Gesellschaft Fur Elektronik In Der Datenubertragung MB.H.
Employment Conditions Abroad Limited
Empresa de Colaboraciones Comerciales, S.A.
Ente Finanziario Interbancario—Efibanca S.P.A.
Eon Corporation
Esquilla Participacoes E Empreendimentos S.A.
Euclid Commercial Joint Venture
Euclid Golf Joint Venture
Eurocard Belgium—Luxembourg S.A.
Eurocard International Kreditkarten—Organization GMBH
Europa Fund Limited
Export Credit Insurance Corporation Of Singapore Pte. Ltd.
Export Finance Corporation Of Canada Ltd.
F. G. L. Service Co., Ltd.
Famibank S.A.
Ferore No. 1 Pty. Limited
Fil—Insure Brokers, Inc.
Finance Houses Association Of Zimbabwe (Private) Limited, The
Financiaciones Industriales Incredit, S.A.
Financial Reserve, Incorporated

Financia Nederland N.V.
Financiera Citicorp S.A.
Finanziaria Industriale Fin. Ind. S.P.A.
Finders Limited
First Citicorp Leasing, Inc.
First Hemphill
First National Nippon Shinpan Co., Ltd.
Fleet (1960) Limited
Flores Tankers Ltd.
Fluidic Industries, Inc.
Ford Lio Ho Motors Co., Ltd.
Forest Creek Venture
Franklin Medical Limited
Friendship Heights Associates
FRMC Corporation
Fuji National City Consulting, Inc.
Fujigin Factors, Ltd.
Fuyo (Panama) S.A.
Fuyo General Lease Co. Ltd.
Fuyo Lease Company Ltd.
Gable Construction (Surrey) Limited
Gable Construction Holdings Limited
Gamma Pacific Maritime Co., S.A.
Garfield Restoration, The
Getan Limited
Giftworld Holdings Limited
Gillespie (Trade Finance) Pty. Limited
Gillespie Bros. (Holdings) Limited
Gillespie Bros. & Company (Oversea) Limited
Gillespie Bros. & Company Limited
Gillespie Bros. U.S.A. Inc.
Gladding Corporation
Glenlui Investments Limited
Global Ocean Co., Ltd.
Grand Yamagata Lease Co., Ltd.
Great Eastern Co-Operative Housing Society Limited
Greater Southwest Community Service Corp.

Grindinvest S.A
Grindlay Brandts A.G.
Grindlay Brandts Clark Marine Limited
Grindlay Brandts Executor & Trustee Company Limited
Grindlay Brandts Export Finance Limited
Grindlay Brandts GMBH
Grindlay Brandts Industrial Finance Limited
Grindlay Brandts Limited
Grindlay Henderson Management Limited
Grindlays (No. 1) Investments
Grindlays (No. 2) Investments
Grindlays (No. 3) Investments
Grindlays (No. 4) Investments
Grindlays (No. 5) Investments
Grindlays (No. 6) Investments
Grindlays (No. 7) Investments
Grindlays (No. 8) Investments
Grindlays (No. 9) Investments
Grindlays (No. 10) Investments
Grindlays Asia Limited
Grindlays Asia Pacific Holdings Limited
Grindlays Asia Pacific Management Services Limited
Grindlays Australia Limited
Grindlays Bahrain Bank B.S.C.
Grindlays Bank (Jersey) Limited
Grindlays Bank (Overseas Management) Limited
Grindlays Bank (Uganda) Limited
Grindlays Bank International (Kenya) Limited
Grindlays Bank International (Uganda) Limited
Grindlays Bank International (Zambia) Limited
Grindlays Bank Nominees (Jersey) Limited
Grindlays Bank of Canada
Grindlays Bank P.L.C.
Grindlays Bank S.A.
Grindlays Company Limited
Grindlays Equipment Finance Limited
Grindlays Eurofinance B.V.

Grindlays Executor & Trust Company (Private) Limited
Grindlays Export Finance A.G.
Grindlays Finance Corporation Limited
Grindlays Futures Limited
Grindlays Holdings P.L.C.
Grindlays Humberclyde Limited
Grindlays Industrial And Commercial Finance Limited
Grindlays Industrial Finance Limited
Grindlays Industrial Holdings Limited
Grindlays Industrial Leasing Limited
Grindlays International Finance (Kenya) Limited
Grindlays International Limited
Grindlays Leasing Limited
Grindlays Leasing Of Zambia Limited
Grindlays Merchant Bank Of Nigeria Limited
Grindlays Nominees (Kenya) Limited
Grindlays Nominees (Pakistan) Limited
Grindlays Nominees (Private) Limited
Grindlays Nominees (Zambia) Limited
Grindlays Participacoes E Servicos Limitada
Grindlays Scotland (Executor & Trustee) Limited
Grindlays Securities Australia Limited
Grindlays Securities Limited
Grindlays Trust Limited
Groupe D'Etudes Techniques Et Commerciales S.A.R.L.
Growth Realty Companies
H.J. Mugdan Limited
Harare Board Of Executors (Private) Limited
Harrison Credit Group, Inc.
HCG Services, Inc.
Hellenic Investment Company, S.A.
HGL Leasing Inc.
Higo General Lease K.K.
Hokuetsu Leasing Co., Ltd., The
Hotel Regina S.A.
Humberclyde Assets Limited
Humberclyde Finance Limited

Humberclyde Leasing Limited
Humberclyde Livestock Limited
Hyster Company
I.S.C., Inc.
Indian Explosives Limited
Industrial Credit And Investment Corporation Of India Limited, The
Industrial Development Corporation Of Zimbabwe Limited
Industrial Finance Corporation Of Thailand
Industrialization Fund Of Finland
Information Technology Limited
Inmobiliaria Jienense, S.A.
Insmore Holdings Ltd.
Interlaken
Investment Corporation Of Bangladesh
Investment Corporation Of Pakistan
Investment Holdings Limited
Investments and Property Holdings Limited
Investors' Finance Corporation
Ipcorn Limited
Isis Industrial Services P.L.C.
Island Finance Corporation
Istituto Central D. Banche E Banchieri
J. Collett Limited
J.J. Finance Pty. Ltd.
J.N. Travers & Co. Limited
Japan Dental Loan Service, Ltd.
Jupiter Navigation Company S.A.
Kao Corporation
Kingsbrooke Co.
KKB Bank KGAA
Konishiroku Photo Industry Co., Ltd.
Korea Long Term Credit Bank
KSV Kreditschutz—Vereinigung GMBH
Kuala Lumpur Clearing House Sendirian Berhad
Kurapa Services (Pvt.) Limited
Lake Terrace Associates

Lampasas, Inc.
Land Trust #5018
Lease Contracts P.L.C.
Lensfield Products Limited
Lerlaw Investments Pty. Limited
Lexington Commons, The
Lexington Village, The
Liberian Bank For Industrial Development and Investment
Lifetime Communities, Inc.
Liquiditats—Konsortialbank GMBH
Llewellyn Sanders (Investissements) S.A.R.L.
London Rubber Exchange Company Limited
Long Term Credit Bank Of Japany, Ltd., The
MacBlast (Scotland) Limited
Maghreb Finance S.A.
Mainstay Computer Cover Limited
Malcha Properties Limited
Mangers Holdings Limited
Marcade Group, Inc.
Marine Partners
MBC Financial Services Corporation
MBC Mortgage Corporation
MBC Realty Corporation
Mercantile Bank Of Canada International N.V., The
Mercantile Bank Of Canada, The
Mercantile Canada Finance B.V.
Merchant Bank (Ghana) Limited
Meridian Partnership Ltd.
Merlin Limited
Minbanc Capital Corporation
Minerva Leasing Limited
Minerva Nominees Limited
Minerva Nominees Scotland Limited
Mission Park Corporation
Mistry Manor Co-Operative Housing Society Limited
Mitsui Trust & Banking Co., Ltd., The

Mittelrheinische Grundstucksverwaltung—Und Vermittlungsgesellschaft Dr. Horbach & Co. KG
Multi Marketing Limited
National And Grindlays Bank & Trust Company Limited
National And Grindlays Bank Limited
National and Grindlays Nominees Limited
National Bank Of India Limited
National Corporation For Housing Partnerships
National Discount Corporation Limited
National Finance And Investments SAL
National Housing Partnership, The
National Stockbrokers Limited
Nationwide Industries, Inc.
Network EFT, Inc.
New England Village, The
New Town Commons
Nigeria International Bank, Limited
Nomisma-Societa Di Studi Economici S.P.A.
Norper Investments Pty. Ltd.
Northern Development (Holdings) Limited
Northstar Home Theatre, Inc.
Norwood Subdivision
Oak Forest Company
Olive Trees Venture
Oman Development Bank S.A.O.
Omnicenter S.A.
One Sansome Street Associates Inc.
Opalton Ltd.
Organization D'Information Et De Securite Pour Le Credit S.A.R.L.
Orient Pacific Capital Investment Corporation
Orland Company
Overseas Bankers Club Limited
P.T. Citicorp Leasing Indonesia
P&F Industries, Inc.
Paddle Creek Enterprises, Inc.
Paddle Creek Joint Venture

Pakistan Industrial Credit And Investment Corporation Limited
Pargola (Shipping) Limited
Park City Partners
Park Plaza Investment
Park West Construction Company
Parking Du Pont Du Mont Blanc S.A.
Parliament Street Nominees Limited
Pars Paper Company Limited
Partridge Hill Company
Peer Services, Inc.
Petroquimica Uniao, S.A.
Philippine Clearing House
Pioneer Atlantic Navigation Co., S.A.
Place Mercantile
Pleasantdale Realty Corporation
Poco Petroleums Limited
Polish Timber Products Limited
Politbutenos Argentinos S.A.
PPLA Plaza, Limited Partnership
Premier Mills Limited
Private Export Funding Corporation
Private Investment Company For Asia
Purcoil (One) Limited
Purcoil (Two) Limited
Ready Credit Limited
Realesco Equities Corp.
Refractarios Lota Green S.A.
Revue Signature S.A.R.L.
RIBA—Representacoes Participacoes E Administracao Ltda.
Rinona Pty. Limited
Rob Roy Country Club Village
Rose Leaf Navigation Co., S.A.
Rose Root Navigation Co., Ltd.
Rose Wood Navigation Co., S.A.
Rosignol Development Corporation

Roxy Petroleum Ltd.
S.I. Quay Du Mont Blanc 7
S.N.—Crefisul S.A.—Distribuidora De Titulos
E Valores Mobiliarios
S.N.—Crefisul S.A.—Sociedade Corretora
S.P.O. Minerals Co. Limited
Sagar Sangeet Co-Operative Housing Society Limited
Sam C. Thomson (Timber) Company Limited
Saudi American Bank
Savings & Loan Network, Inc., The
Schufa Aachen—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Bremen/Weser-EMS-Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Duesseldorf—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Hamburg—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Koln—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Mannheim—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Munchen—Bayerische—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Niederrheinisch—Westfalische—
Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Ostwestfalen—Lippe—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Stuttgart—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schuyler Associates
SCI Bernard Palissy Limoges
SCI Cap Tayat
SCI Cassis Rouet Borde
SCI Clement Michut
SCI Crequi Prevost

SCI Creteil Front Du Lac T.2
SCI Creteil Front Du Lac T.3
SCI De L'Armande
SCI De L'Avenue Berger
SCI De L'Opera
SCI De Zenon
SCI Des Et Financiers
SCI Dolce Farniente
SCI Du Bel Air
SCI Du Bois De Norges
SCI Du Chateau
SCI Du Docteur Cauvin
SCI Evry Bras De Fer
SCI Font De L'Ange
SCI Guyot Walter
SCI Hotel Williams
SCI Jules Noriac
SCI La Clairefontaine
SCI La Cravache
SCI La Huniere
SCI La Margelle
SCI La Martine
SCI La Paloma
SCI La Robertson
SCI La Sourdiere
SCI Lacordaire
SCI Le Bois D'Eragny Montigny Le Bretonneux
SCI Le Campanile
SCI Le Cezanne
SCI Le Coriolan
SCI Le Coriolan 1
SCI Le Coudray Chenet
SCI Le Elos De Lentilly
SCI Le France
SCI Le Madrepore
SCI Le Meridien
SCI Le Poseidon

SCI Le Verger
SCI Les Almadies
SCI Les Alpes Riquier
SCI Les Alpilles
SCI Les Balcons D'Entremont
SCI Les Floralies
SCI Les Gradines
SCI Les Hameaux Des Logissons
SCI Les Hauts De Bonneveine
SCI Les Jardins Le Mont Fleury
SCI Les Mas De La Mer
SCI Les Muses De Vence
SCI Les Olivers
SCI Les Palmiers 1
SCI Les Palmiers 2
SCI Les Palmiers 3
SCI Les Strelizias
SCI Les Trois Tours
SCI L'Esterel
SCI L'Hameau Du Parc
SCI Llewellyn Sanders
SCI Maccarani Buffa
SCI Marne Torcy No. 1
SCI Marne Torcy No. 2
SCI Marne Torcy No. 3
SCI Mire Juan
SCI Moissy Senart 1
SCI Moissy Senart 2
SCI Nice Fabron
SCI Orteaux Vignolles
SCI Parc Des Bruyere
SCI Parking Meyerbeer
SCI Pierre Brunier
SCI Quai De Valmy
SCI Residence De La Croix Du Sud
SCI Residence De L'Etoile Castellane
SCI Residence Du Parc A Groslay

SCI Residence La Simiane
SCI Residence Saint Germain
SCI Rue De L'Elysee
SCI Rue Des Abondances A Boulogne
SCI Rue La Bruyere, J. Lemercier
SCI Rueil Michelet
SCI Super Valmont Redon 2
SCI Trou Du Grillon 1
SCI Trou Du Grillon 2
SCI Val Romain
SCI Versailles Saint Antoine
SCI Villa Atalante
SCI Villiers De L'Aizement
SCI 127 Boulevard Serrurier
SCI 14 Rue Jean Edeline
SCI 15 Rue Pierre Brunier
SCI 17 Rue De Berri
SCI 24-28 Avenue De La Gare
SCI 3-5 Residence Saint Guillaume
SCI 314-330 Avenue Du Prado
SCI 38 Raymond Poincare
SCI 38 Route D'Aulnay
SCI 50-60 Rue Botzaris
SCI 57-59 Rue Des Tilleuls Boulogne
SCI 60 Boulevard De Cimiez
Scottish Timber Products Limited
SED Systems Limited
Senews Limited
Servicios Turisticos Plaza
Shikoku General Lease K.K.
Shinyo Hosho Service Inc.
Showa Financing KK
Sibes Participation En Capital
Sita World Travel (London) Limited
SMB Computers Limited
SNC Parking Du Terrace
Snow Goose Compania Naviera S.A.

Sociedad De Financiacion De Vendas A Credito, S.A.
Societe Anonyme D'Economie Mixte Marignanne
Societe Anonyme Vitrollaise D'Economie Mixte
Societe de Realisation Fonciere et Immobiliere
Societe D'Etude De Centralisation Industrielle Et Da Renovation Urbainne
Societe D'Etude Pour L'Implanation D'Un Centre Mediterranean Pour Le Commerceinternational
Societe Financiere Interprofessionelle D'Entreposage
Societe Interprofessionnelle Pour La Compensation Des Valeurs Immobilieres
Society For Worldwide Interbank Financial Telecommunications S.C.
Sord Computer Systems, Inc.
South American Placers Inc.
Southeastern Holding Company, Ltd.
Southern Syndicate, Inc.
Spar-Und Kreditbank Wien-Reg. Gen. MBH
Spectrum Itex Limited
Sperry New Holland Credit Corporation
Spey Developments Limited
Spey Industrials Limited
Spey Investments Limited
Spey Nominees Limited
Spey Securities Limited
St. Michaels Venture
Straits Oil And Gas Limited
Sul Brasileiro S.A.—Administradora De Cartao De Credito
Sulina—Participacoes E Servicos Ltda.
Sun Lotus Navigation Co., S.A.
Syarikat Export Credit Guarantee Berhad
Tableros Guillermina S.A.
Taiwan First Investment & Trust Co., Ltd.
Tamashin Lease Co., Ltd.
Tarjetas De Credito De El Salvador, S.A.
Tarjetas De Credito De Guatemala, S.A.
Tarjetas De Credito, S.A.

Tarjetas Y Servicios, S.A.
Techcom Australia Pty. Limited
Templar Finance Co. Limited
Tokai Seiki Co., Ltd.
Tokyo Mortgage Acceptance Corporation
Torian Plum Venture
Transleasing, S.A.
Trappeur's Crossing
Trinfinance Ltd.
Tundoors Pty. Limited
Tupuna Pty. Limited
Tupuna Unit Trust, The
Tuticorin Chamber of Commerce
Union Property And Assets (Holdings) Limited
Union Property And Assets Company Limited, The
Vastra Sveriges Traproducenter A.B.
Veda Credit & Travel Service Ltd.
Verlag Fur Absatzwirtschaft GMBH
Vickers Da Costa Finance Limited
Vickers Da Costa (Holdings), Inc.
Village Properties Company
Visayan Integrated Steel Corporation
Vitatron N.V.
Von Seidel Grindlays Trust Company Limited
Von Seidel Nominees (Private) Limited
Walwyn Inc.
Wang Lee Bank, Limited, The
Wardby Limited
Wellrack Properties Limited
West Indian Development Company Limited
Western Trails Venture
Willcox & Gibbs, Inc.
Willings International (Sales) Limited
Wiltminster Limited
Winterpoint II Joint Venture
Wm. Brandts (Australia) Pty. Limited

Wm. Brandts (Hardwood) Limited
Wm. Brandts (Timber) Limited
Wm. Brandts (Wallply) Limited
Wm. Brandt's Sons & Company Limited
Wold P.L.C.
Woodglen Venture
Woods Inc.
Xenotron Limited
Zimbabwe Credit Insurance Corporation Limited
106487 Canada Inc.
400 East Ohio Limited Partnership
540 Company
808 Broadway Associates
1099 Associates

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit (August 1, 1984) (—— F.2d ——)

Nos. 1378, 1379, 1380—August Term, 1983

(Argued May 14, 1984 Decided August 1, 1984)

Docket Nos. 84-4047, 84-4051, 84-4053, 84-4081

NORTHEAST BANCORP, INC. and UNION TRUST COMPANY,
Petitioners-Appellants,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent-Appellee.

CITICORP, a Corporation,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

BEFORE:

CARDAMONE and PRATT, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from orders of the Federal Reserve Board approving mergers pursuant to Sections 3 and 4(c)(8) of the Bank Holding Company Act of 1956.

Affirmed.

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* Of the Southern District of New York, sitting by designation.

BONSAL, *District Judge:*

Petitioners Citicorp ("Citicorp"), Northeast Bancorp, Inc. together with Northeast's subsidiary bank, Union Trust Company (collectively "Northeast"), and intervenor Bank of Boston Corporation ("BBC") petition this court to review three orders of the Board of Governors of the Federal Reserve System (the "Board") which, pursuant to Sections 3 and 4(c)(8) of the Bank Holding Company Act of 1956 (the "BHCA"), approved the applications of:

1) Bank of New England Corporation ("BNE"), a Massachusetts bank holding company, to acquire CBT Corporation ("CBT"), a Connecticut bank holding company;

2) Hartford National Corporation ("HNC"), a Connecticut bank holding company, to acquire Arltru Bancorporation ("Arltru"), a Massachusetts bank holding company; and

3) Bank of Boston Corporation ("BBC"), a Massachusetts bank holding company, to acquire Colonial Bancorp, Inc. ("Colonial"), a Connecticut bank holding company.

In enacting the BHCA, Congress established a framework for the supervision and regulation of bank holding companies, i.e., companies that control one or more banks.[1] Section 3 of the BHCA prohibits any acquisition of a bank by a bank holding company without prior approval of the Board. Section 4 of the BHCA allows bank holding companies, through "non-bank" subsidiaries, to provide finan-

1. 12 U.S.C. § 1841 (c) defines a "bank," in relevant part, as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

cial services which the Board deems to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).[2]

The BHCA, as originally passed by the House of Representatives, banned interstate acquisitions. *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 3, 15 (1955). The original version of the bill reported out by the Senate Committee contained no provision dealing with interstate acquisitions. *See* S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955). However, Senator Douglas of Illinois proposed an amendment in the Senate which was adopted by both Houses as Section 3(d) of the BHCA (the Douglas Amendment). The Douglas Amendment provided that no application by a bank holding company to acquire a bank located in another state could be approved by the Board unless the state in which such bank was located had, by statute, specifically authorized such acquisition.[3]

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2. Bank holding companies are generally prohibited from owning stock in companies other than banks.

3. Section 3(d) of the BHCA, 12 U.S.C. § 1842(d) (the Douglas Amendment) provides:

> *Limitation by State boundaries.* Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 U.S.C. § 1823 (f)]) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, *unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.* For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest. (Emphasis added.)

Massachusetts, in 1982, and Connecticut, in 1983, enacted statutes (hereinafter referred to as the Massachusetts and Connecticut statutes, respectively) to permit interstate bank acquisitions. The Massachusetts statute authorized bank holding companies located in any other New England state to acquire banks located in Massachusetts, provided that the New England state in which such bank holding company was located had granted reciprocal privileges to bank holding companies located in Massachusetts. The Connecticut statute contained a similar provision.[4]

(1) *THE BNE APPLICATION*

On July 11, 1983 BNE entered into an agreement to acquire CBT under the authority of the Connecticut statute. On August 5, 1983, pursuant to Sections 3 and 4(c)(8) of the BHCA, BNE applied to the Board for approval of its proposed acquisition of CBT. By notice published in the *Federal Register* dated September 15, 1983, the Board invited comment on BNE's application.[5] Citicorp and Northeast opposed the application and asked the Board to defer action pending the outcome of litigation Northeast had instituted challenging the constitutionality of the Connecticut statute, which litigation was dismissed on December 16, 1983.[6] On March 26, 1984 the Board approved BNE's pro-

4. Mass. Gen. Laws Ann. ch.167 A, § 2 (West Supp. 1982); 1983 Conn. Act 83-411 (Reg. Sess.). Rhode Island has enacted a similar statute, effective July 1, 1984, which is limited to New England acquisitions for two years after its effective date. R.I. Gen. Laws §§ 19-30-1, 19-30-2 (1984).

5. Application Notice, 48 Fed. Reg. 41,524 (1983).

6. On July 29, 1983 Northeast filed an action in the U.S. District Court in Connecticut against the Connecticut Banking Commissioner. On December 16, 1983 Northeast's complaint was dismissed on the ground that Northeast lacked standing to challenge the constitutionality of the Connecticut statute. *Northeast Bancorp, Inc.* v. *Woolf*, 576 F. Supp. 1225 (D. Conn. 1983), *aff'd mem.*, No. 84-7003 (2d Cir. April 25, 1984).

posed acquisition of CBT pursuant to Sections 3 and 4(c)(8) of the BHCA.[7] The Board found that the acquisition came within the Douglas Amendment because it had been specifically authorized by the Connecticut statute. The Board found that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." The Board also found no "clear and unequivocal" basis for finding the Connecticut statute unconstitutional.

(2) *THE HNC APPLICATION*

On September 1, 1983 HNC entered into an agreement to acquire Arltru under the authority of the Massachusetts statute. On October 19, 1983, pursuant to Section 3 of the BHCA, HNC applied to the Board for approval of its proposed acquisition of Arltru. By notice published in the *Federal Register* dated November 25, 1983, the Board invited comment.[8] By letter dated December 16, 1983 and attachments, Citicorp opposed HNC's application. On March 26, 1984 the Board approved HNC's proposed acquisition of Arltru pursuant to Section 3 of the BHCA.[9] The Board found that the acquisition came within the Douglas Amendment because it had been specifically authorized by the Massachusetts statute. The Board found that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." The Board also found no "clear and unequivocal" basis for finding the Massachusetts statute unconstitutional.

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7. *Bank of New England Corporation*, 70 Fed. Res. Bull. 374 (1984).

8. Application Notice, 48 Fed. Reg. 53,172 (1983).

9. *Hartford National Corporation*, 70 Fed. Res. Bull. 353 (1984).

(3) *THE BBC APPLICATION*

BBC entered into an agreement to acquire Colonial under the authority of the Connecticut statute, and pursuant to Sections 3 and 4(c)(8) of the BHCA BBC applied to the Board for approval of its proposed acquisition of Colonial. By notice published in the *Federal Register* dated February 16, 1984, the Board invited comment on BBC's application.[10] On March 8, 1984 Citicorp filed comments with the Board opposing the application. On May 18, 1984 the Board approved BBC's proposed acquisition of Colonial pursuant to Sections 3 and 4(c)(8) of the BHCA.[11] On the basis of the Board's findings with respect to the applications of BNE and HNC, the Board refused to find the Connecticut statute unconstitutional, and so approved BBC's application.

Pursuant to Section 9 of the BHCA, Citicorp and Northeast filed with this court petitions for review of the orders of the Board approving the BNE-CBT and HNC-Arltru acquisitions.[12] The petitions were consolidated and the acquisitions stayed pending review by this court of the orders of the Board. BNE, CBT, HNC, the State of Connecticut and the Commonwealth of Massachusetts were permitted to intervene. Thereafter, on May 25, 1984, pursuant to Fed. R. App. P. 15(d), BBC moved for leave to intervene, which motion was granted by this court on June 18, 1984. BBC also moved to consolidate for decision the petition for review filed in its action with the petitions

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10. Application Notice, 49 Fed. Reg. 6012 (1984).

11. *Bank of Boston Corporation*, 70 Fed. Res. Bull. 524 (1984).

12. Section 9 of the BHCA (12 U.S.C. § 1848) provides that any party aggrieved by an order of the Board may petition for a review of the order in the United States Court of Appeals and that the Court shall have jurisdiction to affirm, set aside, or modify the Board's order.

pending before the court. This motion was also granted by this court on June 18, 1984.

DISCUSSION

Petitioners Citicorp and Northeast contend that the Board erred in approving the applications of BNE, HNC, and BBC because the Massachusetts and Connecticut statutes, by limiting interstate acquisitions of Massachusetts and Connecticut banks to bank holding companies located in other New England states, impermissibly restrict interstate commerce in violation of the Commerce Clause. Petitioners argue that since the Massachusetts and Connecticut statutes violate the Commerce Clause, they are unconstitutional, and the Douglas Amendment did not permit the Board to approve the applications. Petitioners also contend that the Massachusetts and Connecticut statutes are part of an interstate understanding which violates the Compact Clause. They charge that by discriminating against non-New England bank holding companies, the statutes also violate the Equal Protection Clause.

The intervenors, on the other hand, contend that the Massachusetts and Connecticut statutes promote interstate commerce and do not violate the Commerce Clause. The intervenors argue that even if the statutes restrict interstate commerce, they do not violate the Commerce Clause since they were enacted under the authority of the Douglas Amendment. The intervenors say that the Massachusetts and Connecticut statutes do not represent an interstate agreement or compact in violation of the Compact Clause; and finally, the intervenors argue that the statutes do not violate the Equal Protection Clause.

The contentions of the parties make it necessary for us to first consider the origin and scope of the Douglas Amendment.

THE DOUGLAS AMENDMENT

As previously stated, the BHCA, as originally passed by the House of Representatives, banned all interstate acquisitions. However, Senator Douglas of Illinois proposed the Douglas Amendment in the Senate and it was adopted by both Houses as Section 3(d) of the BHCA. The Douglas Amendment provided that no application by a bank holding company to acquire a bank located in another state could be approved by the Board unless the state in which such bank was located had specifically authorized such acquisition by statute.[13] In describing his proposed amendment, Senator Douglas stated:

> What our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them . . . .
>
> 102 Cong. Rec. 6858 (1956).

At the time the Douglas Amendment was enacted, no state permitted interstate acquisitions by bank holding companies. Therefore, Senator Douglas observed that the immediate effect of the amendment would be "to bar the expansion of bank holding companies across State lines." 102 Cong. Rec. at 6860. "But," he added, "the amendment would leave the way open for States to make explicit

13. Section 3(a) of the BHCA allows the Board to approve the acquisition of both banks and bank holding companies.

provision for such purchases and acquisitions if they so decided." *Id.*

The Board, after reviewing its legislative history, found the Douglas Amendment to be a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies." As recently pointed out by the Supreme Court in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* —— U.S. —— (1984), "[t]he Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference."

The Douglas Amendment prohibits the Board from approving applications by bank holding companies to acquire banks located in other states unless the state in which the bank is located has enacted a statute "specifically authorizing" such acquisitions. The Massachusetts and Connecticut statutes specifically authorize acquisitions of Massachusetts and Connecticut banks by bank holding companies located in other New England states. Without these statutes no out-of-state bank holding companies could acquire Massachusetts or Connecticut banks. Therefore, in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it.

We have considered the argument that the Massachusetts and Connecticut statutes, to avoid conflicting with federal law, must either permit all bank holding companies throughout the United States to acquire their banks or permit none. However, we find nothing in the language or history of the Douglas Amendment which supports this contention. *See Iowa Independent Bankers v. Board of*

Governors of the Federal Reserve System, 511 F.2d 1288, 1296-97 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975). Indeed, Section 7 of the BHCA reserves to the states the power and jurisdiction they possessed before the BHCA was enacted.[14]

COMMERCE CLAUSE

The Commerce Clause grants to Congress the power "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const., Art. I, § 8, cl. 3. Congress, of course, may regulate commerce among the states as it sees fit. *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 652 (1981); *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 434 (1946). The Commerce Clause has been interpreted to limit the power of the states to interfere with or impose burdens on interstate commerce. *Western & Southern Life Insurance Co.,* 451 U.S. at 652; *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 35-36 (1980); *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 370-71 (1976). However, if Congress authorizes the states to regulate some aspect of interstate commerce, any action taken by a state within that authority is "invulnerable" to challenge. *Western & Southern Life Insurance Co.,* 451 U.S. at 652-53. Moreover, Congress may authorize the states to enact statutes which may interfere with interstate commerce. Such statutes do not violate the Commerce Clause. *White v. Massachusetts Council of Construction Employers,* 460 U.S. 204 (1983). However, congressional authorization must be clear. *South Central*

14. Section 7 of the BHCA (12 U.S.C. § 1846) provides:

Reservation of rights to States. The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

Timber Development, Inc. v. Wunnicke, —— U.S. —— (1984); *White,* 460 U.S. at ——(1983); *Western & Southern Life Insurance Co.,* 451 U.S. at 653-54. We believe that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here.

For the reasons above stated, we conclude that the Massachusetts and Connecticut statutes do not violate the Commerce Clause. Therefore, the Board, in approving the acquisitions, properly concluded that there was no such violation.

COMPACT CLAUSE

The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." U.S. Const., Art. I, § 10, cl. 3.

Petitioners contend that the Board's approval of the BNE-CBT, HNC-Arltru, and BBC-Colonial acquisitions should be reversed because the Massachusetts and Connecticut statutes which authorized them were enacted pursuant to an interstate compact to establish a regional banking system in the New England area. Such a compact, say petitioners, violates the Compact Clause.

In addition to the statutes enacted by Massachusetts and Connecticut, Rhode Island has enacted a statute which also limits acquisition of its banks to bank holding companies located in other New England states. However, the Rhode Island limitation will expire two years after the statute's effective date of July 1, 1984. Maine, by statute, permits the acquisition of Maine banks by out-of-state bank holding

companies without limitation.[15] Vermont and New Hampshire do not have bank holding company statutes.

In view of the similarities in the Massachusetts and Connecticut statutes and the limitation to New England bank holding companies, the statutes could be considered as part of a plan or compact to create a regional banking system. Indeed, after considering the legislative history of the Massachusetts and Connecticut statutes and the fact that they were enacted within a six-month period, the Board found that the statutes indicated a plan to create a regional banking system in New England. However, such a plan, even if treated as a compact, would only violate the Compact Clause if it were a "combination tending to the increase of political power in the States, which may encroach upon or interfere with the supremacy of the United States." *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 471 (1978) (quoting *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893)); *New Hampshire v. Maine,* 426 U.S. 363, 369 (1976).

As a practical matter, we do not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States. However, if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation.

EQUAL PROTECTION CLAUSE

Petitioners argued before the Board that the Massachusetts and Connecticut statutes were unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides: "No State shall . . . deny to any person within its

15. Me. Pub. Law 1983, ch. 302, § 2, as amended (1984).

jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. Petitioners contend that by only allowing New England bank holding companies to acquire Massachusetts and Connecticut banks, the Massachusetts and Connecticut statutes discriminate against non-New England bank holding companies in violation of the Equal Protection Clause.

This type of legislation violates the Equal Protection Clause only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Barry v. Barchi*, 443 U.S. 55, 67 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). We do not believe that the Massachusetts and Connecticut statutes evidence such irrationality. Rather, because "banking and related financial activities are of profound local concern," *Lewis*, 447 U.S. at 38, the Massachusetts and Connecticut statutes appear to be designed to foster banking and related activities in those states and in neighboring New England states. Massachusetts and Connecticut may be concerned that their banks could be dominated by large bank holding companies located in New York or Chicago if such holding companies were allowed to acquire their banks.[16] Therefore, we find no violation of the Equal Protection Clause. *See generally Iowa Independent Bankers*, 511 F.2d at 1294-96.

In view of the foregoing, we affirm the orders of the Board approving the applications of BNE, HNC, and BBC.

AFFIRMED.

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16. According to statistics published by the Association of Bank Holding Companies, each of the four largest New York bank holding companies has greater assets than those of all the New England bank holding companies combined. Association of Bank Holding Companies, *Bank Holding Company Facts* (Spring 1983 ed.).

APPENDIX C

Order of the Board of Governors of the Federal Reserve System Approving the Application of Bank of New England Corporation to Merge with CBT Corporation (March 26, 1984)

FEDERAL RESERVE SYSTEM

Bank of New England Corporation
Boston, Massachusetts

Order Approving Merger of Bank Holding Companies and Acquisition of Companies Engaged in Commercial Finance, Leasing, Real Estate Lending, Factoring and General Trust Company Activities

Bank of New England Corporation, Boston, Massachusetts ("BNE"), a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("BHC Act"), has applied for the Board's approval under section 3(a)(5) of the Act (12 U.S.C. § 1842(a)(5)), to merge with CBT Corporation, Hartford, Connecticut ("CBT"), also a bank holding company, and thereby to acquire indirectly The Connecticut Bank and Trust Company, N.A., Hartford, Connecticut. In addition, BNE has applied for the Board's approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 U.S.C. § 225.23(a)(2)) to acquire CBT's nonbanking subsidiaries: CBT Trust Company of Florida, N.A., West Palm Beach, Florida ("CBT Trust"); Lazere Financial Corporation, New York, New York ("Lazere"); CBT Business Credit Corporation, Hartford, Connecticut ("BCC"); CBT Factors Corporation, New York, New York ("Factors"); CBT

Realty Corporation, Hartford, Connecticut ("Realty"); and General Discount Corporation, Boston, Massachusetts ("GDC"). These companies, with the exception of CBT Trust, are subsidiaries of CBT Financial Corporation, Hartford, Connecticut, a company organized as a holding company for CBT's nonbanking subsidiaries. CBT Trust engages in general trust company activities in Florida. Lazere and BCC offer accounts receivable, inventory and equipment financing. Factors engages in "advance" and "maturity" factoring, and Realty in real estate lending. GDC, with subsidiaries in Maine, Massachusetts and Canada, engages in capital equipment financing through lending and leasing, and its Canadian subsidiary, CBT Leasing Limited, conducts such lending and leasing activities outside the United States pursuant to section 4(c)(13) of the Act (12 U.S.C. § 1843(c)(13)). All of these activities have been determined by the Board to be closely related to banking under sections 225.25(b)(1), (3) and (5) of Regulation Y (12 C.F.R. § 225.25(b)(1), (3) and (5)).

Notice of these applications, affording an opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act (48 *Federal Register* 41524). The time for filing comments has expired and the Board has considered the applications and all comments received in light of the factors set forth in section 3(c) (12 U.S.C. § 1842(c)) and the considerations specified in section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)). In particular, the Board has considered the comments of Citicorp, New York, New York, and Northeast Bancorp, Inc., New Haven, Connecticut, as well as the comments of several community groups located in Hartford, Connecticut.

BNE, with twelve bank subsidiaries, has consolidated assets of $5.9 billion and deposits of $3.7 billion, represent-

ing 13.3 percent of the total deposits in commercial banks in Massachusetts.[1] BNE is the fourth largest commercial banking organization in Massachusetts. CBT, which has total assets of $5.9 billion and total deposits of $3.4 billion, is the largest bank holding company in Connecticut. CBT holds 24.8 percent of all deposits in commercial banks in Connecticut. Upon consummation of the proposed merger, BNE would become the second largest bank holding company in New England in terms of assets and the largest in terms of domestic deposits.

Section 3(d) of the Act (12 U.S.C. 1842(d)), the Douglas Amendment, prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which the operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." The statute laws of Connecticut authorize the acquisition of a banking institution in Connecticut by a bank holding company that controls a bank located in another New England state, if that other New England state authorizes on a reciprocal basis the acquisition of a bank in that state by a Connecticut bank holding company.[2] Massachusetts has passed a reciprocal statute that authorizes such an acquisition.[3]

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1. Banking data are as of June 30, 1983.

2. 1983 Conn. Acts 411 (Reg. Sess.) entitled "An Act Concerning Interstate Banking" ("Connecticut Interstate Banking Act" or "CIBA"), § 2.

3. Mass. Ann. Laws ch. 167A ("Massachusetts Interstate Banking Act"), § 2.

The Banking Commissioner of Connecticut and the Massachusetts Board of Bank Incorporation have approved this proposed merger pursuant to these reciprocal Interstate Banking Acts, thus finding that the transaction satisfies the requirements of the respective statutes authorizing the interstate acquisition of banks. Based upon its review of the Connecticut Interstate Banking Act ("CIBA"), the Board concludes that Connecticut has by statute expressly authorized a Massachusetts bank holding company, such as BNE, to acquire a Connecticut bank or a Connecticut bank holding company, such as CBT. Thus, the Connecticut Act meets the requirement of express authorization for interstate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act.

The Connecticut and Massachusetts statutes are the first to be enacted that provide explicitly for limited interstate banking on a regional basis. Rhode Island has also enacted regional interstate banking legislation that limits entry into Rhode Island to bank holding companies located in New England.[4] The restriction in the Rhode Island statute, however, is of limited duration. After two years the Rhode Island statute provides for national reciprocity, permitting entry of bank holding companies from any state that will admit Rhode Island bank holding companies.

The regional interstate banking system developing in New England raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. The Georgia legislature has already passed a regional interstate banking statute, and there are proposals for regional banking sys-

4. R.I. Gen. Laws §§ 19-30-1, 19-30-2 (Supp. 1983).

tems in the Southeast (Florida and Georgia and a combination of other states as far north as Virginia), the Northwest (Washington, Oregon and Idaho), the Mid-Atlantic (New Jersey, Pennsylvania and several other states as far south as Virginia) and the Mid-West (several different regional groupings under discussion). Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation.[5]

The Constitutionality of the Connecticut Statute

Protestants, Citicorp and Northeast Bancorp, Inc., have challenged the constitutionality of the Connecticut Interstate Banking Act[6] and, in particular, the provisions of CIBA that allow only New England bank holding compa-

5. To date, only Maine (Me. Rev. Stat. Am. tit. 9-B, § 1013 (as amended February 7, 1984)) and Alaska (Alaska Stat. § 06.05.235 (Supp. 1983)) permit interstate banking without restriction, although New York permits entry of bank holding companies from any state on a reciprocal basis (N.Y. Banking Law § 142-b (McKinney Supp. 1983)).

6. By letter of November 16, 1983, counsel for BNE asserts that Citicorp is not a party in interest to this proceeding with standing to raise issues concerning the constitutionality of CIBA. Pursuant to section 105 of the BHC Act, 12 U.S.C. § 1850, Northeast clearly will become a competitor to BNE upon consummation of this acquisition. Moreover, the Board believes that Citicorp, too, is a party in interest for purposes of this proceeding before the Board since Citicorp competes in Connecticut and Massachusetts with BNE and CBT, although on a somewhat limited basis, and, except for the restrictions contained in the very statute it challenges, it has the potential to become a more substantial competitor.

nies[7] to acquire banks or bank holding companies located in Connecticut. The Protestants assert that such discriminatory legislation is unconstitutional under the provisions of the Compact Clause,[8] the Equal Protection Clause[9] and the Commerce Clause[10] of the United States Constitution.

The requirement that the Board address these issues derives from a series of judicial decisions beginning with *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Company,* 379 U.S. 411 (1965), which required that the Board make a finding in the first instance on the applicability and validity of state laws that purport to authorize the particular transaction before the Board.[11] The United States Court of Appeals for the District of Columbia Circuit confirmed that this requirement applied to constitutional issues when it stated in *Iowa Independent*

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7. New England bank holding companies include those with their principal place of business in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Connecticut statute further restricts the definition of "New England bank holding company" to exclude bank holding companies directly or indirectly controlled by bank holding companies outside of New England. CIBA thus prohibits non-New England bank holding companies from "leapfrogging" into the Connecticut market through Maine or other New England states that may enact interstate banking statutes without regional restrictions.

8. U. S. Const., Article I, section 10, clause 3.

9. U. S. Const., Amendment XIV, Section 1.

10. U. S. Const., Article I, section 8, clause 3.

11. Justice Douglas in his dissent in *Whitney* noted that the specific issue with respect to the Louisiana statute at issue in that case would require the Board to decide a "bare, bald question of . . . constitutionality." 379 U.S. at 431. See also *First State Bank of Clute* v. *Board of Governors,* 553 F.2d 950 (5th Cir. 1977), and *Gravois Bank* v. *Board of Governors,* 478 F.2d 546 (8th Cir. 1973), which do not deal with constitutional issues but require a decision by the Board as to the applicability of state laws to bank holding company acquisitions.

Bankers Association v. *Board of Governors of the Federal Reserve System,* 511 F.2d 1288, 1293 n.4 (1975), that it felt constrained "to register . . . substantial doubt that the Board can continue to presume conclusively the constitutional validity of state or federal laws in light of the Supreme Court's opinion in [*Whitney*] . . . ."

While in cases prior to *Iowa Independent Bankers, supra,* the Board declined to consider constitutional issues, *NCNB Corp.,* 59 Fed. Res. Bull. 305, 307 (1973),[12] the reservations about this course of action expressed by the D.C. Circuit in that case has led the Board to review the constitutionality of state statutes, although the Board has decided that it will not "hold a state statute to be unconstitutional without clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution." *NCNB Corp.,* 68 Fed. Res. Bull. 54, 56 (1982).[13] The Board believes this standard to be consistent with the principle of statutory construction that legislatures are presumed to have acted within constitutional limits,[14] as well as with the historic role of the judicial branch of government in balancing state and federal interests in construing the scope of the constitutional powers of the states. This approach is also con-

12. See also *Bankers Trust New York Corp.,* 59 Fed. Res. Bull. 364 (1973) and *Northwest Bancorporation,* 38 Fed. Reg. 21,530 (1973).

13. See also *Florida Coast Banks, Inc.,* 68 Fed. Res. Bull. 781 (1982); *Florida Coast Banks, Inc.,* 69 Fed. Res. Bull. 454 (1983). Moreover, the Board has indicated on one occasion that were it to follow the interpretation of a state statute urged by a party to an application it would be compelled to declare the statute to be unconstitutional. *KSAD, Inc.,* 70 Federal Reserve Bulletin 44 (1984).

14. See *Clements* v. *Fashing,* 102 S. Ct. 2836, 2843 (1982); *South Carolina State Highway Department* v. *Barnwell Bros., Inc.,* 303 U.S. 177, 195 (1938); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Matthews,* 174 U.S. 96 (1899).

sistent with the Board's primary expertise and delegated responsibility under the Act—to review bank holding company expansion proposals for compliance with the public benefits test of section 4(c)(8) of the Act, including financial, competitive and community convenience and needs criteria.

Thus, the Board will require evidence of a clear conflict with the United States Constitution before the Board will find that CIBA constitutes an invalid authorization for the interstate merger of bank holding companies proposed in this case.

The Board has examined carefully the arguments advanced by Protestants and the unique and fundamental constitutional issues presented by CIBA in the context of the extensive record before the Board. After review of the record, the Board concludes that, while the issue is not free from doubt, there is no clear and unequivocal basis for a determination that CIBA is inconsistent with the Commerce Clause, Compact Clause or Equal Protection Clause of the United States Constitution.[15] Accordingly, the Board will not deny this application on the grounds urged by Protestants that CIBA is unconstitutional. The analysis of this proposal under sections 3 and 4 of the Bank Holding Company Act is based upon this finding.

Considerations Under Sections 3 and 4 of the Bank Holding Company Act

In addition to determining that the merger of BNE and CBT is expressly authorized by a valid statute as required by section 3(d) of the BHC Act, the Board must decide

15. The staff analysis of the constitutional issues raised by Protestants is contained in an appendix to this Order and is made a part of the Board's findings in this case.

whether this acquisition is consistent with the standards of sections 3 and 4 of the Act.

Section 3 Considerations. BNE's twelve banking subsidiaries operate in nine of the fourteen Massachusetts banking markets,[16] while CBT's single bank subsidiary operates in each of the ten Connecticut banking markets.[17] Since BNE's banking subsidiaries do not operate in Connecticut and CBT's banking subsidiary does not operate in Massachusetts, the proposed transaction would not eliminate any significant existing competition in any relevant banking market.

The Board also has considered the effects of this proposal on probable future competition in light of its proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[18] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition.

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16. These Massachusetts banking markets include Boston, Springfield, Cape Cod, Fall River, New Bedford, Amherst-Northhampton, Greenfield, North Adams-Williamstown and Athol. BNE also operates in the Massachusetts portion of the Providence, Rhode Island, banking market.

17. These Connecticut banking markets include Hartford, New Haven, Bridgeport, Waterbury, New London, Danbury, Torrington, Danielson, Willimantic and Old Saybrook. CBT also operates in the Connecticut portion of the New York market.

18. "Proposed Policy Statement of the Board of Governors of the Federal Reserve System for Assessing Competitive Factors under the Bank Merger Act and the Bank Holding Act," 47 *Federal Register* 9017 (March 3, 1982). Although the proposed policy statement has not been adopted by the Board, the Board is using the policy guidelines in its analysis of the effects of a proposal on probable future competition.

With respect to the ten banking markets in Connecticut in which CBT operates, the record shows that either the markets are not highly concentrated or there are numerous other probable future entrants into the markets. Connecticut permits the acquisition of banks in Connecticut by bank holding companies located in other NewEngland states, and there are a number of commercial banking organizations, including five in Massachusetts (other than BNE) and three in Rhode Island, with assets over $1 billion each that can be identified as probable future entrants into the Connecticut banking markets. Moreover, the Board notes that market concentration ratios and CBT's rank and market share drop significantly in each Connecticut market when deposits of thrift institutions are considered. In view of these considerations and other facts of record, the Board concludes that elimination of BNE as a probable future entrant into markets served by CBT would not have a substantial anticompetitive effect in those markets.

With respect to the nine Massachusetts[19] banking markets in which BNE operates, the record shows that there are a number of commercial banking organizations, including three commercial banking organizations in Connecticut (other than CBT) and three in Rhode Island with assets over $1 billion each, that can be identified as probable future entrants into each of the nine relevant markets. The markets with the fewest number of potential entrants, Boston and Cape Cod, are also not concentrated. Moreover, BNE is not a market leader in several markets, particularly when

19. BNE has less than a one percent market share in the Providence, Rhode Island, banking market and CBT has less than a one percent market share in the New York, New York, banking market. As a result, only Massachusetts and Connecticut markets are discussed in this Order.

the deposits of thrift institutions are considered. On the basis of these and other facts of record, the Board concludes that the elimination of CBT as a probable future entrant would not have a substantial anticompetitive effect in the nine markets served by BNE.

The financial and managerial resources of BNE, CBT, and their subsidiaries are considered satisfactory and their prospects appear favorable. This finding is based, in part, on the fact that BNE has committed to a program to raise additional capital through a common stock offering and, in particular, to improve the capital position of its lead bank, Bank of New England, N.A., Boston, Massachusetts.

The Board has considered the convenience and needs of the communities to be served. Although both BNE and CBT offer a complete range of banking services, consummation of this merger would provide more favorable access to the capital markets and thereby permit BNE to provide expanded access to consumer banking services in Connecticut and Massachusetts, additional credit capacity for growing commercial customers and the presence of a substantial New England based competitor to meet growing competition from nonbanking financial conglomerates in the financial services industry.

In considering the convenience and needs of the communities to be served, the Board has also examined the record of BNE and CBT and their banking subsidiaries in meeting the credit needs of their communities, as provided in the Community Reinvestment Act of 1977 (12 U.S.C. §§ 2901-05)("CRA") and the Board's Regulation BB (12 C.F.R. § 228). The CRA and Regulation BB require the Board to assess the record of the banking subsidiaries of any applicant in meeting the credit needs of their local commu-

nities, including low- and moderate- income neighborhoods, consistent with safe and sound operations. Although the Board does not ordinarily consider the CRA record of the acquiree, the Board, for purposes of this case, has considered the CRA records not only of BNE's banking subsidiaries but also that of CBT because this merger involves two bank holding companies of approximately equal size.

Three Hartford, Connecticut, neighborhood citizens associations, Frog Hollow Residents Coalition, Concerned Citizens of Southwest and Behind the Rocks Neighborhood Association, have protested this application on the basis of an alleged failure of CBT to meet the housing financing needs of the low- and moderate-income neighborhoods of Hartford.[20] In addition, the Frog Hollow Residents Coalition alleged that CBT has failed to honor a commitment made in July 1982 to provide a special fund for mortgage, home improvement and housing rehabilitation loans to owner-occupants of the Frog Hollow community.

The community group Protestants have failed to present any substantial evidence to support their position. Nevertheless, the Board has considered the issues raised by Protestants and the extensive response CBT has provided with respect to its lending history and practices in Protestants' neighborhoods. The record demonstrates that, pursuant to a July 1982 commitment, CBT has established a special housing-related lending program for the Frog Hollow community and has made a significant commitment of funds at

20. The Small Business Association of New England requested a hearing on the application to explore a concern that the merger of major New England banks would result in larger institutions that might not be responsive to the credit needs of small business enterprises. After a meeting with officials of CBT and BNE, the Small Business Association of New England was satisfied and it withdrew its request for a hearing.

favorable rates and without ancillary costs. CBT has also documented its commitment to meet the housing needs of low- and moderate-income neighborhoods through housing ventures with other companies and neighborhood groups.

In the neighborhoods of the other two Protestants, Behind the Rocks and Southwest, CBT has a strong record of home improvement loans and it ranks among the leading lending institutions in those areas in terms of the number of home improvement loans. CBT has also documented a low demand for first mortgages in these two areas. CBT has made a commitment to increase its efforts to make residents of Protestants' communities aware of its loan programs. Based on the foregoing and other facts in the record, the Board concludes that CBT and BNE have satisfactory records of compliance with the CRA. The considerations relating to the convenience and needs of the communities to be served weigh in favor of approval.

Section 4 (c)(8) Considerations. BNE has also applied under section 4(c)(8) of the BHC Act to acquire the nonbanking subsidiaries of CBT, including Lazere, BCC, Factors, GDC and Realty, which are all organized as subsidiaries of CBT Financial.[21] BNE has only one active nonbanking subsidiary operating pursuant to section 4(c)(8).[22] CBT's only nonbanking subsidiary that operates in Massachusetts is GDC, which is engaged in leasing and lending activities. GDC derives approximately $14 million in com-

21. CBT's nonbanking subsidiaries will represent less than two percent of the consolidated assets of the merged corporation.

22. BNE received approval after the filing of this application to acquire *de novo* a subsidiary to engage in leasing activities. That subsidiary, BNE Capital Corporation, Boston, Massachusetts, began operations on December 28, 1983.

mercial loans and leasing activities from the entire state of Massachusetts.

This proposal would have only minimal impact on actual competition among nonbanking subsidiaries of BNE and CBT. Moreover, this proposal will have no significant impact on existing competition between BNE's subsidiary banks and GDC. Given the size of CBT's equipment financing subsidiary and the limited scope of its activities in Massachusetts, the Board does not believe this transaction will result in any significant decreased competition.

There is no evidence in the record that this transaction will result in any undue concentration of resources, unfair competition, unsound banking practices, conflicts of interest or other adverse effects. Based upon these and other considerations reflected in the record, the Board has determined that the balance of public interest factors that it is required to consider under section 4(c)(8) of the Act is favorable.

Based on the foregoing and other facts of record, the Board has determined that the applications under section 3 and 4 of the Act should be and hereby are approved for the reasons set forth above.

In approving this application the Board does not intend to express any conclusion concerning the desirability, as a matter of national policy, of the regional arrangements provided for by CIBA. The Board recognizes that interstate banking is a highly complex issue that unavoidably involves the balancing of a number of different considerations. However, if the New England regional approach to interstate banking is emulated in other parts of the country, there is a potential danger that the result could be to divide the country into a number of banking regions. The Board be-

lieves that the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action.

The acquisition of CBT's banking subsidiaries pursuant to section 3 of the Act shall not be made before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority. The approval of BNE's proposal to acquire CBT's nonbank subsidiaries and to engage in equipment financing, leasing, real estate lending, factoring, and accounts receivable financing is subject to all the conditions set forth in Regulation Y, including section 225.4-(d) and section 225.23(b), and to the Board's authority to require modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and Board's regulations and orders issued thereunder, or to prevent evasion thereof.

By order of the Board of Governors,[23] effective March 26, 1984.

(signed) James McAfee

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

23. Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Teeters, Rice, and Gramley.

Appendix to the Order Approving the Application of Bank of New England Corporation, Boston, Massachusetts, to Merge with CBT Corporation, Hartford, Connecticut

Citicorp, New York, New York, and Northeast Bancorp, Inc., New Haven, Connecticut, have protested the application of Bank of New England Corporation, Boston, Massachusetts, to merge with CBT Corporation, Hartford, Connecticut. Citicorp and Northeast argue that the application should be denied because the Connecticut Interstate Banking Act ("CIBA") is unconstitutional and therefore insufficient to authorize the proposed merger. Protestants challenge the provisions of CIBA that allow only New England bank holding companies[1] to acquire banks or bank holding companies located in Connecticut. The Protestants assert that such discriminatory legislation is unconstitutional under the provisions of the Compact Clause,[2] the Equal Protection Clause[3] and the Commerce Clause[4] of the United States Constitution.

CIBA (and the similar statute enacted in Massachusetts) raises unique constitutional issues. There are many decided

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1. New England bank holding companies include those with their principal place of business in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Connecticut statute further restricts the definition of "New England bank holding company" to exclude bank holding companies directly or indirectly controlled by bank holding companies outside of New England. CIBA thus prohibits non-New England bank holding companies from "leapfrogging" into the Connecticut market through Maine or other New England states that may enact interstate banking statutes without regional restrictions.

2. U.S. Const., Article I, section 10 clause 3.

3. U.S. Const., Amendment XIV, Section 1.

4. U.S. Const., Article I, section 8, clause 3.

cases defining the permissible scope of state regulations favoring their own residents against those of all other states, but apparently no judicial decisions testing the constitutionality of state regulatory arrangements which discriminate in favor of residents of selected regional groupings of states and exclude residents of all other states from the benefits provided to the regional groups.[5]

Considerations Under the Compact Clause

The Compact Clause of the United States Constitution states that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."[6]. The Supreme Court has indicated that an interstate agreement is within the parameters of the Compact Clause and thus subject to the requirement of congressional consent only when: (1) an interstate compact or agreement exists, (2) that tends to increase the power of the compacting states in such a manner as to interfere with federal supremacy.[7]

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5. While there are judicial decisions upholding interstate agreements, these agreements have not had the objective of discrimination but rather that of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements. *See, e.g., Washington Metropolitan Area Transit Authority* v. *One Parcel of Land,* 706 F.2d 1312, 1314 (4th Cir.), *cert. denied,* 104 S. Ct. 238 (1983); *Jacobson* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353, 1357 (9th Cir. 1977), *aff'd in part and rev'd in part sub nom. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979).

6. Art. I, § 10, cl. 3. This clause has been invoked infrequently, particularly in recent years when expanded interpretation of what constitutes interstate commerce has meant that agreements among states more frequently might be invalidated as burdening interstate commerce in violation of the Commerce Clause.

7. See *United States Steel Corporation* v. *Multistate Tax Commission,* 434 U.S. 452 (1978); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893).

CIBA, when considered in light of its legislative history and the actions of other New England states, is part of an effort to create a regional banking zone. The regional banking acts of Connecticut, Massachusetts and Rhode Island contain very similar provisions, and they were enacted within a six-month period between December, 1982, and June, 1983. Passage of the acts was preceded during a four-month period by a formal meeting of representatives of the New England states to discuss regional interstate banking, by the formation of a New England Committee to Study and Promote Regional Interstate Banking, by testimony of legislators at hearings on the issue before legislative committees in other New England states, and by apparent review and comments on the proposed Connecticut legislation by the Massachusetts Banking Department. The debate on the Connecticut bill refers to an "agreement" or "compact" on regional interstate banking.[8]

The Supreme Court in *Virginia* v. *Tennessee,* 148 U.S. 503, 517-518 (1893), stated that the terms "agreement" and "compact" as used in the Compact Clause are "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects." In *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 470 (1978), the Court specifically addressed the issue of reciprocal statutes and stated that "agreements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal

8. See Transcripts of Connecticut Senate Debate, May 18, 1983 ("Conn. Sen. Debate") at 61, 96 (Sen. Sullivan); Transcripts of Connecticut House of Representatives Debate, May 26, 1983 ("Conn. House Debate") at 224, 234, 236 (Rep. Onorato) and 276, 277 (Rep. Jaekle).

supremacy similar to the threats inherent in a more formalized 'compact' . . ." The Court emphasized that the federal impact rather than the form of the agreement is the critical inquiry under the Compact Clause. Accordingly, while in form CIBA can be considered to be part of an implicit compact or agreement that has never been approved or authorized by Congress, as the cases cited above indicate, CIBA would violate the Compact Clause only if it constitutes an enhancement of state powers at the expense of federal supremacy.

No such claim of infringement upon federal supremacy could be maintained, however, if CIBA has been authorized by Congress in the Douglas Amendment. The compatibility of CIBA with the Compact Clause turns on whether Congress in the Douglas Amendment granted the states plenary power to regulate entry of out-of-state bank holding companies, thereby renouncing a federal interest in such regulation for purposes of the Compact Clause. The intent of Congress in enacting the Douglas Amendment is more fully discussed below, *infra* at 15-27, and, for reasons stated therein, the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies. As a result CIBA does not appear to violate the Compact Clause.

Considerations Under the Equal Protection Clause

Protestants also challenge the constitutionality of CIBA as a violation of the Equal Protection Clause of the Fourteenth Amendment, which provides "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Protestants argue that CIBA's exclusion

of non-New England bank holding companies is an arbitrary restriction unrelated to any legitimate state purpose.

The Supreme Court in *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam), articulated the following, frequently cited standard of judicial scrutiny under the Equal Protection Clause:[9]

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory distinctions and require only that the classification challenged be rationally related to a legitimate state purpose.

Application of the test of whether economic legislation is "rationally related to a legitimate state purpose" involves two inquiries: (1) whether the challenged statute has a legitimate purpose, and (2) whether it was reasonable for the legislature to believe the challenged classification would promote that purpose.[10]

In answering these inquiries, the Supreme Court has afforded great deference to a state's statements of legislative purpose and its statutory classifications to achieve those purposes. The Supreme Court has ordinarily been willing to uphold any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. . ." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 530 (1959). The court will sustain economic legislation "if any set of facts reason-

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9. See also *Dandridge* v. *Williams*, 397 U.S. 471, 484-486 (1971); *Iowa Independent Bankers Association* v. *Board of Governors, supra.*

10. See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-463 (1981); *Western and Southern Life Insurance Co.*, 451 U.S. at 668.

ably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961).

For the purpose of analysis under the Equal Protection Clause, CIBA appears to be rationally related to an attempt to maintain a banking system responsive to local needs in New England. The Hebb Report, a report prepared by a Commission appointed by the Connecticut legislature to study interstate banking, indicates that the purposes of CIBA include avoiding undue concentration of resources, maintaining the responsiveness of the banking system to local credit needs and providing an opportunity for a limited interstate banking experiment.[11] A finding of a rational basis for CIBA is consistent with the decision of the Court of Appeals for the District of Columbia Circuit in *Iowa Independent Bankers, supra,* upholding an Iowa statute against an Equal Protection Clause argument although that statute permitted only one out-of-state bank holding company to operate in Iowa. This case held that state statutes, such as CIBA, governing admission of out-of-state bank holding companies into a particular state, such as Connecticut, involve essentially economic legislation and do not raise issues of fundamental rights or draw upon suspect classifications. Since CIBA does not impinge those rights found to be fundamental by the Supreme Court or employ inherently suspect classifications, it will not be closely scrutinized by the courts under the Equal Protection Clause.

Thus, Connecticut can advance a sufficiently rational purpose in enacting CIBA to meet the less stringent scru-

11. "The Report to the General Assembly of the State of Connecticut of The Commission to Study Legislation to Limit the Conduct of Business in Connecticut by Subsidiaries of Bank Holding Companies," January 5, 1983 ("The Hebb Report"), pp. 10, 12-13.

tiny of the courts under the "rational purpose" test. On this basis, CIBA does not appear to violate the Equal Protection Clause of the Fourteenth Amendment.

Considerations Under the Commerce Clause

BNE and CBT assert that Congress, in the Douglas Amendment, conferred upon each state complete authority to permit, regulate or condition the entry into the state by out-of-state bank holding companies for the purpose of engaging in banking activities. BNE and CBT argue that Congress authorized the states not only to determine whether to permit acquisitions of banks across state lines but also to determine the extent to which to permit such acquisitions. Protestants, on the other hand, assert that the Douglas Amendment does not authorize states to place discriminatory restrictions on the admission of out-of-state bank holding companies, particularly on a state-by-state basis.

1. CIBA Under the Commerce Clause

Absent congressional authorization of CIBA in the Douglas Amendment, it appears that CIBA would be inconsistent with the standards for state action under the Commerce Clause as establishd by the Supreme Court. The central concern behind the Commerce Clause, according to the Court, is a desire "to avoid the tendencies toward economic Balkanization that had plagued relations between the Colonies and later among the States under the Articles of Confederation," *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1978), and to create a "federal free trade unit" based on a principle that "our economic unit is the Nation" and

that "the states are not separable economic units." *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525, 537-538 (1947).

The Court has applied the Commerce Clause as granting Congress the power "[to] regulate commerce . . . among the several states",[12] and also as a limitation on the power of the states to impose barriers to or burdens on interstate commerce.[13] The basic rationale for this interpretation is both economic and political, and these concerns are particularly applicable to state statutes that selectively confer benefits on one or more other states and deny these same benefits to still other states. The Court has forcefully stated these core concerns:

> This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled.
>
> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations

12. U. S. Const., Art. I, § 8, cl. 3.

13. *Great Atlantic and Pacific Tea Company* v. *Cottrell,* 424 U.S. 366, 370-71 (1976).

> and reprisals would ensue if such practices were begun!
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons, 336 U.S. at 538-39 (citations omitted).

The states retain the authority, particularly pursuant to their powers to safeguard the health and safety of their residents, to regulate matters of legitimate local concern in such a way as may impose incidental burdens on interstate commerce. However, the states may not regulate in a manner that imposes more than an incidental burden on interstate commerce[14] or that discriminates against articles of commerce from outside a given state unless there is some reason apart from their origin to treat them differently.[15]

In those instances where the states have acted to effect purposes of simple economic protectionism or in a manner that is patently discriminatory, the Supreme Court has held such state statutes to be *per se* unconstitutional.[16] In those cases where the states credibly advance a legitimate state purpose other than protection of local business, the

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14. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

15. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 27, (1980). See also *Philadelphia* v. *New Jersey, supra*, at 626-627.

16. *Philadelphia* v. *New Jersey, supra*, at 624.

Court has applied a balancing test, weighing whether the statute in question serves a legitimate state purpose and whether it could accomplish that purpose in a manner less burdensome to interstate commerce.[17]

Absent authorization by the Douglas Amendment, it would appear that, under the standards applied by the Court[18], CIBA imposes a burden on interstate commerce of the type that would be found by the courts to violate the Commerce Clause. CIBA permits only bank holding companies located in New England to engage in banking activities in Connecticut while denying that right to bank holding companies located elsewhere. The discriminatory nature of CIBA is apparent from its legislative history, which demonstates the intention of the Connecticut legislature to permit Connecticut banks and bank holding companies to develop and consolidate on a regional basis before having to compete with banks outside the region.[19]

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17. *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

18. See *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951) (ordinance of the City of Madison, Wisconsin, requiring all milk sold in Madison to be processed and bottled at a plant within five miles of the city); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (West Virginia requirement that all local needs for natural gas be met before natural gas could be shipped out of the state); *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949) (denial of a milk receiving plant in New York to a Massachusetts distributor because it would injure local competition); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (New Jersey law prohibiting the import of liquid or solid waste which originated or was collected outside the State of New Jersey; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (Florida law prohibiting out-of-state bank holding companies from engaging in investment advisory activities).

19. The Hebb Report, *supra*, at 12. See also Conn. Sen. Debate, *supra*, at 60, 64, 70 (Statement of Senator Sullivan) and Conn. House Debate at 241, 258 (Statement of Representative Onorato).

BNE and CBT contend that CIBA does not conflict with the Commerce Clause decisions of the Supreme Court because CIBA relieves the ban or burden on interstate commerce imposed by Congress to the extent that it would replace six different banking zones in the individual New England states with a single barrier-free New England zone. They argue that Congress has imposed a restriction on interstate banking in the Douglas Amendment and that it has permitted the states to lift that ban by a specific statutory enactment.

In support of this position, BNE and CBT cite *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 815-816 (Stevens, J. concurring) (1976). In *Alexandria Scrap*, the Supreme Court upheld a Maryland statute that paid a bounty for destruction of any junked car formerly titled in Maryland despite a challenge that the statute made it easier for Maryland scrap processors to prove that a vehicle had been titled in Maryland than it did for out-of-state processors. The Court held that where a state acted as a market participant the Commerce Clause did not apply.[20] The Connecticut regional banking zone at issue in this case is clearly an example of the regulatory rather than proprietary function of the State of Connecticut, and Connecticut is not itself creating commerce by its own direct intervention in the marketplace. The reliance of BNE and CBT on the *Alexandria Scrap* rationale thus appears to be misplaced and, in fact, succeeding Supreme Court decisions seem to limit the *Alexandria Scrap* reasoning to those situations where the states are "market participants" rather than

20. In his concurring opinion, Justice Stevens suggested that the decision in effect held that, since Maryland "created a market that did not previously exist," it could not be found to burden commerce. 426 U.S. at 815-816.

"market regulators." See *Reeves, Inc.* v. *Stake,* 447 U.S. 429, 436 (1980).[21]

Even if CIBA were not to be considered a *per* se unconstitutional burden on interstate commerce, the disparate treatment of non-New England bank holding companies does not appear to be justified "as an incidental burden necessitated by legitimate local concerns." *Lewis* v. *BT Investment Managers, supra,* 447 U.S. at 42. The Supreme Court suggested in the *Lewis* case that with respect to banking there are legitimate state interests in "discouraging undue economic concentration," "maximizing local control" and "regulating financial practices presumably to protect local residents from fraud." *Id.* at 43. The Court, however, found in that case that a complete ban on out-of-state entry into the trust business in Florida could not be justified as an incidental burden necessitated by legitimate local concerns. The Court noted that there were other regulatory techniques available to deal with local concerns that non-resident bank holding companies were more likely to be sources of monopoly power or fraud than local companies.

Similarly, in this case, there are less restrictive means than a discriminatory geographic restriction to accomplish the objectives of the Connecticut legislature. There is no indication that all New York or New Jersey companies, for example, raise greater problems with respect to local con-

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21. "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 436-437 (citations omitted). See also *White* v. *Massachusetts Council of Construction Employers,* 103 S. Ct. 1042 (1983); *United Building & Construction Trades Council* v. *Mayor & Council of Camden,* 52 U.S.L.W. 4187 (U.S. Feb. 21, 1984).

trol and economic concentration than those of Massachusetts and Rhode Island. To accomplish the objective of avoiding concentration of resources in a non-discriminatory manner limitations could be placed on total banking assets or total deposits that a bank holding company may hold in order to qualify for additional acquisitions within Connecticut. These and other less discriminatory alternatives suggest that CIBA would not be viewed as an incidental burden on interstate commerce necessitated by legitimate local concerns. This conclusion is consistent with the Supreme Court's finding in the *Lewis* case that Florida's interest in local control did not justify a prohibition on entry of non-resident trust companies because of the discriminatory burden which the limitation imposed on interstate commerce. Thus, CIBA does not appear to be consistent with the prohibition in the Commerce Clause on discrimination against interstate commerce by the states.[22]

2. *Discrimination Authorized by the Douglas Amendment.*

BNE and CBT, however, contend that the Douglas Amendment authorizes the discrimination provided for by CIBA. The Douglas Amendment provides:

> Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside

22. In *Northeast Bancorp* v. *Wolf*, (Civil Action H-83-654), the U.S. District Court for the District of Connecticut in an opinion issued December 16, 1983, dismissed a challenge to the Connecticut Act on standing grounds but it described the Act as ". . . statutory provisions that discriminate between New England and non-New England banks . . . ."

> of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1842(d)(1). The Supreme Court in *Lewis, supra,* 447 U.S. at 47, described this language as establishing a general federal prohibition on acquisition or expansion of banking subsidiaries across state lines and as conferring on the states only "authority to create exceptions to this general prohibition."

It is clear that if Congress, in the Douglas Amendment, authorized discriminatory state action, CIBA would not be unconstitutional under the Commerce Clause. In the specific context of the Douglas Amendment, the Supreme Court has stated that Congress may prohibit as well as promote commerce[23] and may exercise its plenary power under the Commerce Clause "by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *RT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).[24] The issue presented by CIBA is the extent of a state's powers when it

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23. See *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 434 (1946).

24. See also *Prudential Insurance Company* at 423-24.

decides to lift the Douglas Amendment prohibition. Does the Douglas Amendment, which establishes a total prohibition on acquisitions by out-of-state bank holding companies, authorize a state to discriminate among the states when it permits entry? Does the Douglas Amendment permit Connecticut to admit bank holding companies from neighboring Massachusetts and other New England states meeting certain qualifications regarding reciprocity but not from other states even if they were to meet the reciprocity qualifications?

It is, therefore, necessary to determine the scope of authorization, if any, for states to discriminate among other states in lifting the Douglas Amendment's ban against interstate acquisition of banks by bank holding companies. This task is more difficult because, as noted above, this case involves an unusual form of discrimination. There is a long history of decisions of the Supreme Court and lower federal courts involving the application of the Commerce Clause to state laws that provide a preference for their own residents as against those of *all* other states. No case has been found under the Commerce Clause or generally in the literature on this Clause, in which a state has provided for preferential treatment of its own citizens and those of selected other states, while excluding the residents of all other states from this favored treatment.

In deciding cases where the differential treatment is applied against all other states equally, the Supreme Court requires, in order to find an authorization for discrimination in federal statutes, that such authorization be "ex-

pressly"[25] or "explicitly"[26] or "specifically"[27] stated in federal law. In *Sporhase* v. *Nebraska,* 458 U.S. 941, 960 (1982), defendants challenged a Nebraska law restricting the export of ground water as an impermissible burden on interstate commerce. Nebraska argued in defense of its statute that the congressional intent to authorize otherwise impermissible burdens on interstate commerce was demonstrated by 37 federal statutes in which Congress had indicated its intent not to preempt state water laws and by congressional authorization of certain interstate surface water compacts. The Court rejected this argument, holding that these federal statutes did not show an "expressly stated" intention to remove Commerce Clause restraints on state water laws. Similarly, in *New England Power Company* v. *New Hampshire,* 455 U.S. 331, 341 (1982), and in *Lewis, supra,* the Court held that federal statutes reserving to the states residual authority over export of electricity or over bank holding companies were in no sense affirmative grants of power to the states to impose undue burdens on interstate commerce. The Court may have relaxed this high standard somewhat in *White* v. *Massachusetts Council of Construction Employees,* 103 S. Ct. 1042 (1983), where it approved geographic restrictions on the hiring of non-resident workers for city-funded construction projects, relying upon the explicit regulations of the Department of Housing and Urban Development and a general, unspecific authorization in federal statute for such regulations.

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25. *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 340-41 (1982).

26. *Western and Southern Life Insurance Co.* v. *State Board of Equalization,* 451 U.S. 648, 653-654 (1981).

27. *White* v. *Massachusetts Council of Construction Employers,* 103 S. Ct. 1042 (1983).

Based on these requirements for specificity, the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states. The Douglas Amendment's general authorization to the Board of Governors to permit interstate acquisitions if they are "... specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication," does not appear to meet the stringent test of explicitness laid down by the Supreme Court.

BNE and CBT argue, however, that the legislative history of the Douglas Amendment indicates the intention of the Congress to give the states complete discretion in setting the terms of entry of out-of-state bank holding companies without the limitations imposed by the Commerce Clause. While reliance on the legislative history is a valid method of determining that Congress authorized the lifting of Commerce Clause restrictions with respect to a particular state enactment, the Supreme Court has expressed reluctance to place undue weight on this type of inquiry in an attempt to find authority from Congress for states to discriminate against the residents of other states. The Court has stated:

> Reliance on . . . isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and "a step to be taken cautiously."

New England Power, 455 U.S. at 341, quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1976). When

Congress has not expressly stated an intent to permit state legislation otherwise inconsistent with the Commerce Clause, the Court has no authority to rewrite the legislation "based on mere speculation of what Congress probably had in mind." *Id.* at 343.[28]

The Douglas Amendment was proposed during the debate on the Senate floor and there is no committee or other significant legislative history to clarify its meaning.[29] There was very little discussion of the power of the states to override the interstate banking ban imposed by the Douglas Amendment and no discussion of the power of the states to discriminate among potential out-of-state entrants.[30] Congress was clearly more concerned with the federal prohibition on interstate acquisitions than on terms under which the states could lift this ban.

In his remarks during the Senate debate, Senator Douglas, sponsor of the Amendment, referred to the ability of the states to permit the entry of out-of-state bank holding companies "only to the degree that state laws ex-

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28. The Court has allowed discrimination against other states generally based upon a clear statement of congressional intent contained in the legislative history of a federal statute. Relying on the clearly expressed intention of Congress, derived from the legislative history, to leave insurance regulation exclusively to the states, the Court has found the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, to authorize discriminatory state statutes that would otherwise offend the Commerce Clause. *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 427-432 (1946), and *Western and Southern Life Insurance Co., supra*, 451 U.S. at 465.

29. The pertinent debates are found at 102 Cong. Record 6750-58 and 6854-62 (1956).

30. See *Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied* 423 U.S. 875 (1975).

pressly permit them."[31] He also stated that the Amendment paralleled the McFadden Act restrictions on the power of national banks to branch intrastate and interstate "in a way contrary to State policy."[32] Thus it can be persuasively argued that Senator Douglas construed his amendment as granting plenary power to the states to set their own policies and to permit entry of out-of-state bank holding companies to the degree that they chose. However, there is also an argument that the excerpts from the Senate debate are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause, especially where the Supreme Court has required such explicit and clear authorization of discrimination by the Congress because of the fundamental implications of such discrimination for the federal union.

The Board has a limited amount of judicial guidance on this issue. The only court to consider the legislative history of the Douglas Amendment has been the U.S. Court of Appeals for the District of Columbia Circuit in *Iowa Independent Bankers Association* v. *Board of Governors,* 511 F.2d 1288, 1293 (1975). The case involved, in part, a challenge under the Equal Protection Clause of the Fourteenth

31. "[W]hat our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act." 102 Cong. Record 6858 (1956).

32. "[The amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State." 102 Cong. Record 6860 (1956).

Amendment to the Iowa statute that permitted, on the basis of their location in the state prior to the enactment of the Bank Holding Company Act Amendments of 1970, out-of-state bank holding companies operating two or more banks in Iowa to continue to expand and to acquire new banks in Iowa on the same basis as a local bank holding company.

A less stringent standard applies to state action under the Equal Protection Clause than under the Commerce Clause. Under the former provision a state need only show that its economic legislation, presuming it does not affect fundamental rights or create a suspect classification, bears a rational relationship to a legitimate state purpose. Under the Commerce Clause, however, discrimination is disabling *per se,* and even when a statute only imposes an incidental burden on interstate commerce it will be struck down if such burden is clearly excessive in relation to expected local benefits. The Court upheld the constitutionality of the Iowa statute under the Equal Protection Clause on the basis that it was actually a statute that conferred grandfather rights on the only out-of-state bank holding company operating in Iowa.

The Court then turned to petitioners argument that the Iowa statute conflicted with federal law, specifically with the Douglas Amendment. Petitioners in *Iowa Independent Bankers* advanced the argument that the Iowa statute conflicted with "implicit . . . prohibition against discrimination between out-of-state bank holding companies,"[33] which, they asserted, was intended by Congress in the Douglas Amendment. They argued that under the Douglas Amendment states may only decide "whether to extend the right to acquire in-state banks to all out-of-state bank holding

33. *Iowa Independent Bankers, supra,* 511 F.2d at 1296.

companies or to prohibit such acquisitions entirely."[34] The Court then reviewed the limited legislative history of the Douglas Amendment and these arguments, finding that Congress did not intend to bar discrimination like that embodied in the Iowa statute. The Court also stated that the Douglas Amendment conferred on the states a right to control the expansion of interstate banking "so that such expansion would not contravene state policy."[35]

The Court's review of the legislative history of the Douglas Amendment in *Iowa Independent Bankers* was not conducted for purposes of determining the validity of the Iowa statute under the Commerce Clause. Therefore, the Court did not focus on the Supreme Court's standard of review under the Clause and did not consider whether the alleged legislative authorization by the Douglas Amendment is express and unambiguous so as to sanction discrimination against interstate commerce that would otherwise run afoul of the Commerce Clause.

The actions of the states and the Board in interpreting and applying the Douglas Amendment also lend some support to the position that the Amendment authorizes the states to permit restricted or conditional entry of out-of-state bank holding companies such as sanctioned by CIBA. As early as 1972, Iowa enacted a statute that accorded certain grandfather rights to expand and to make additional acquisitions to out-of-state bank holding companies already controlling two or more banks in Iowa[36]—establishing, in

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34. *Ibid.*

35. *Id.* at 1297. In *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 615 (1983). The Court of Appeals for the D.C. Circuit restated its conclusion that the legislative history of the Douglas Amendment allowed a state "to discriimnate in admitting bank holding companies."

36. Iowa Code Ann. § 524.1805.

fact, a preference for a particular out-of-state bank holding company against all other non-resident companies. Recently, Nebraska enacted a similar statute.[37] In addition, Delaware,[38] Maryland,[39] Virginia[40] and Nebraska[41] have permitted out-of-state bank holding companies to acquire local banks under certain conditions, including limitations on activities, number of offices and home office location, which are not imposed on in-state bank holding companies. One of the major purposes of such legislation is to gain employment for local residents and tax revenues for the state without seriously affecting competing local banking businesses; the statutes accomplish this by permitting out-of-state bank holding companies to export their credit card operations to states with less restrictive usury laws. Similarly, South Dakota has recently permitted the entry of out-of-state bank holding companies on a limited basis to acquire a state bank with a broad range of insurance powers.[42] The Board has approved a number of applications by out-of-state bank holding companies to acquire local banks under the credit card or grandfather statutes[43] and, as noted above, the U.S. Court of Appeals for the Dis-

37. Neb. Rev. Stat. § 8-903 (Supp. 1983).

38. Del. Code Ann., title 5, § 803.

39. Md. Fin. Inst. Code Ann. § 5-901.

40. Va. Code § 6.1-390 to 6.1-397.

41. Neb. Rev. Stat. §§ 8-905, 8-906 (Supp. 1983).

42. S.D. Codified Laws Ann. §§ 51-16-40 to 51-16-44 (Supp. 1984).

43. *See, e.g., Citicorp,* 67 Fed. Res. Bull. 181 (1981); *J.P. Morgan & Company, Inc.,* 67 Fed. Res. Bull. 917 (1981); *Northwest Bancorporation,* 38 Fed. Reg. 21,530 (1973).

trict of Columbia has upheld a Board order under the Iowa statute.[44]

These statutes obviously result in some burdens on interstate commerce and appear to assume that the states have full discretion to set the terms of entry of out-of-state bank holding companies.[45] Nothing in the history of the Douglas Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry.[46] In approving applications under these statutes, the Board appears to have accepted at least some measure of discretion rather than requiring a simple "on and off switch." A contrary conclusion would seem to raise some questions about the validity of the state statutes cited above, although it would appear that such statutes might be viewed as imposing substantially less of a burden on commerce in the furtherance of legitimate state objectives than CIBA imposes.

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44. *Iowa Independent Bankers Association, supra.*

45. To a lesser degree state statutes that permit limited out-of-state acquisition only in the case of a troubled bank in need of financial assistance also allow the states to condition entry. See, for example, Wash. Rev. Code Ann. § 30.04.230.

46. Senator Robertson, Chairman of the Senate Committee on Banking and Currency, suggested by his comments in the 1956 debate on the Bank Holding Company Act that Congress may have intended to give the states more authority than merely to allow unrestricted entry of out-of-state bank holding companies. Senator Robertson suggested that states should be permitted to retain the authority to permit acquisitions by out-of-state bank holding companies in the limited case where a troubled bank might require financial assistance. 102 Cong. Record 6572 (1956).

APPENDIX D

Order of the Board of Governors of the Federal Reserve System Approving the Application of Hartford National Corporation to Acquire Arltru Bancorporation, Inc. (March 26, 1984)

FEDERAL RESERVE SYSTEM
Hartford National Corporation
Hartford, Connecticut

Order Approving Acquisition of a Bank Holding Company

Hartford National Corporation, Hartford, Connecticut ("HNC"), a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("BHC Act"), has applied for the Board's approval under section 3(a)(3) of the Act (12 U.S.C. § 1842(a)(3)), to acquire Arltru Bancorporation, Lawrence, Masachusetts ("Arltru"), also a bank holding company, and thereby to acquire indirectly The Arlington Trust Company, Lawrence, Massachusetts.

Notice of this application, affording an opportunity for interested persons to submit comments, has been given in accordance with section 3(b) of the Act. The time for filing comments has expired and the Board has considered the application and all comments received in light of the factors set forth in section 3(c) of the Act (12 U.S.C. § 1842(c)), including the comments of Citicorp, New York, New York.

HNC, the second largest commercial banking organization in Connecticut, has consolidated assets of $5.9 billion.[1] Its sole subsidiary bank, The Connecticut National Bank ("CNB"), has deposits of $3.1 billion, representing 23.8 percent of the total deposits in commercial banks in the

1. Banking data are as of September 30, 1983.

state.[2] Arltru, which has total assets of $819 million and total deposits of $689 million, is the eighth largest bank holding company in Massachusetts. Arltru holds 2.4 percent of all deposits in commercial banks in Massachusetts.

Section 3(d) of the Act (12 U.S.C. 1842(d)), the Douglas Amendment, prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." The statute laws of Massachusetts authorize the acquisition of a banking institution in Massachusetts by a bank holding company that controls a bank located in another New England state, if that other New England state authorizes on a reciprocal basis the acquisition of a bank in that state by a Massachusetts bank holding company.[3] Connecticut has passed such a reciprocal statute.[4]

The Massachusetts Board of Bank Incorporation has approved the proposed merger pursuant to these reciprocal Interstate Banking Acts, thus finding that the transaction

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2. These figures do not reflect the mergers of CNB with The Mattatuck Bank and Trust Company, Waterbury, Connecticut, or with the three subsidiary banks of First Bancorp, Inc., New Haven, Connecticut, which would increase CNB's deposits by approximately $825 million and make HNC the largest commercial banking organization in Connecticut, with 29 percent of the deposits in commercial banks in the state.

3. Mass. Ann. Laws Ch. 167A ("Massachusetts Interstate Banking Act"), § 2.

4. 1983 Conn. Acts 411 (Reg. Sess.) entitled "An Act Concerning Interstate Banking" ("Connecticut Interstate Banking Act"), § 2.

satisfies the reciprocity requirements of the respective statutes authorizing the interstate acquisition of banks. Based upon its review of the Massachusetts Interstate Banking Act, the Board concludes that Massachusetts has by statute expressly authorized a Connecticut bank holding company, such as HNC, to acquire a Massachusetts bank or bank holding company, such as Arltru. Thus, the Massachusetts Act meets the requirement of express authorization for intersate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act.

Citicorp has protested this application and has challenged the constitutionality of the Massachusetts Interstate Banking Act, in particular, its provision that allows only New England bank holding companies[5] to acquire banks or bank holding companies located in Massachusetts.

The Board has stated that in the absence of clear and unequivocal evidence of the inconsistency of a state law with the United States Constitution, it will not hold the state statute to be unconstitutional.[6] In the Board's Order issued today with respect to the application of Bank of New England Corporation, Boston, Massachusetts, to merge with CBT Corporation, Hartford, Connecticut, the Board considered the validity of the Connecticut Interstate Banking Act under the Commerce Clause, Compact Clause, and Equal Protection Clause of the United States Constitution and did not find there to be clear and unequivocal evidence that the Connecticut statute was unconstitutional.

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5. New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

6. *Bank of New England Corporation,* Federal Reserve Board Order of March 26, 1984, *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982).

In language and effect, the challenged provisions of the Massachusetts statute parallel the provisions of the Connecticut Interstate Banking Act, and the legislative history of both acts confirms that the two states intended complementary statutes.[7] The Board thus believes that its reasoning with respect to the Connecticut Act's constitutionality applies directly to the Massachusetts Interstate Banking Act. Therefore, for the reasons set forth in detail in the Appendix to the Board's Order approving the application of Bank of New England Corporation, the Board concludes that the Massachusetts Interstate Banking Act is not unconstitutional. Accordingly, the Board will not deny this application on the grounds of unconstitutionality urged by Protestant.

In addition to determining that the merger of HNC and Arltru is expressly authorized by a valid statute, as required by section 3(d) of the Bank Holding Company Act, the Board must decide whether this acquisition is consistent with the statutory standards of section 3 of the Act. Arltru's single banking subsidiary, The Arlington Trust

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7. Massachusetts State Senator John A. Brennan, Jr., the primary sponsor of the Massachusetts Interstate Banking Act, stated, in testimony before the Connecticut Senate Banking Committee, that the proposed Connecticut bill bore a "remarkable similarity" to the Massachusetts Act. Transcript of Hearings before the Connecticut Joint Standing Committee on Banks, March 3, 1983, at 14. Further, the committee summary of the revised Senate bill that became the Massachusetts Interstate Banking Act stated that the purpose of the legislation was "to establish the necessary authority . . . for a regional, New England, banking system" and that the bill's revision was meant to "ensure that only New England based financial institutions can avail themselves of this authority." Massachusetts Joint Standing Committee on Banks & Banking, Research Staff Summary at 1 (November 9, 1982).

Company, operates in the Boston banking market,[8] the largest and the least concentrated of the banking markets in Massachusetts. Arltru is the sixth largest of sixty-four commercial banking organizations in the Boston market and controls 3.1 percent of the total deposits in commercial banks in that market.[9] Inasmuch as none of HNC's banking subsidiaries operates in Massachusetts and Arltru's banking subsidiary does not operate in Connecticut, the proposed transaction would not eliminate any significant existing competition in any relevant banking market. HNC does control a loan production office that operates in the Boston market, but it opened in April, 1983, and is not a significant competitor.

The Board has considered the effects of this proposal on probable future competition and has also examined the proposal in light of its proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[10] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into

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8. The Boston banking market includes all of Suffolk and Essex Counties, most of Middlesex, Norfolk, and Plymouth Counties, and small parts of Bristol and Worcester Counties. The market extends over the entire eastern coast of Massachusetts, excluding Cape Cod, and also includes 13 towns in southern New Hampshire.

9. Market deposit data are as of June 30, 1982. Over 200 thrift institutions compete in the market. Arltru is the tenth largest depository institution in the market and it controls only 1.4 percent of all deposits in financial institutions in the market.

10. "Proposed Policy Statement of the Board of Governors of the Federal Reserve System for Assessing Competitive Factors under the Bank Merger Act and the Bank Holding Act," 47 *Federal Register* 9017 (March 3, 1982). Although the proposed policy statement has not been adopted by the Board, the Board is using the policy guidelines in its analysis of the effects of a proposal on probable future competition.

the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition. After consideration of these factors in the context of the specific facts of this case, the Board concludes that consummation of this proposal would not have any significant adverse effects on probable future competition in any relevant market.

The record shows that the Boston banking market, in which Arltru operates, is not highly concentrated. In view of this consideration and other facts of record, the Board concludes that elimination of HNC as a probable future entrant into the Boston market would not have a substantial anticompetitive effect in that market. HNC's banking subsidiaries operate in the ten Connecticut banking markets.[11] There are numerous probable future entrants into nine of these markets, since bank holding companies located in Rhode Island and Massachusetts are now eligible for entry. The tenth market is not highly concentrated.

Based on the foregoing and other facts of record, the Board concludes that consummation of the proposed acquisition of Arltru's banking subsidiary would not have any significant adverse effects on existing or probable future competition and would not increase the concentration of banking resources in any relevant area.

The financial and managerial resources of HNC and Arltru are considered satisfactory and their prospects appear favorable. HNC has made a commitment, as a part of this transaction, to increase the capital of Arltru's sub-

11. The ten Connecticut banking markets are Hartford, New Haven, Bridgeport, Waterbury, New London, Danbury, Torrington, Danielson, Willimantic, and Old Saybrook.

sidiary, The Arlington Trust Company. The Board considers financial considerations to be positive.

With respect to convenience and needs considerations, both HNC and Arltru have a satisfactory record of Community Reinvestment Act compliance. Consummation of this merger would permit Arltru to provide additional credit capacity to serve more and larger commercial customers. HNC also proposes to expand The Arlington Trust Company's trust department as well as its mortgage lending, municipal financing, and commercial banking services. The considerations related to the convenience and needs of the communities to be served weigh in favor of approval.

Based on the foregoing and other facts of record, the Board concludes that the proposed acquisition is in the public interest and that the application should be and hereby is approved. The acquisition shall not be made before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority.

By order of the Board of Governors,[12] effective March 26, 1984.

(signed) JAMES MCAFEE

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

12. Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Teeters, Rice, and Gramley.

APPENDIX E

Order of the Board of Governors of the Federal Reserve System Approving the Application of Bank of Boston Corporation to Acquire Colonial Bancorp, Inc. (May 18, 1984)

FEDERAL RESERVE SYSTEM
Bank of Boston Corporation
Boston, Massachusetts

Order Approving Acquisition of a Bank Holding Company and Companies Engaged in Mortgage Banking and Leasing Activities

Bank of Boston Corporation, Boston, Massachusetts, a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for the Board's approval under section 3(a)(5) of the Act (12 U.S.C. § 1842-(a)(5)), to acquire the successor by merger to Colonial Bancorp, Inc., Waterbury, Connecticut ("Colonial"), also a bank holding company, and thereby to acquire Colonial Bank, Waterbury, Connecticut. In addition, Applicant has applied for the Board's approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 C.F.R. § 225.23(a)(2)) to acquire Colonial's nonbanking subsidiaries: Colbanc Realty Corporation, Waterbury, Connecticut ("Realty"), which engages in mortgage banking activities, and Colbanc Leasing Corporation, Waterbury, Connecticut ("Leasing"), which leases personal property. These activities have been determined by the Board to be closely related to banking and permissible for bank holding companies (12 C.F.R. § 225.25(b)(1) and (5)).

Notice of these applications, affording an opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act (49 *Federal Register* 6012 (1984)). The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in section 3(c) of the Act (12 U.S.C. § 1842(c)) and the considerations set forth in section 4(c)(8) of the Act, including the comments of Citicorp, New York, New York, challenging the constitutionality of the Connecticut statute under which the proposed acquisition is to be made.

Applicant, with the nine banking subsidiaries, is the largest commercial banking organization in Massachusetts and New England and has consolidated assets of $19.5 billion and total domestic deposits of $5.9 billion, representing 20.2 percent of the total deposits in commercial banks in Massachusetts.[1] Colonial, the fourth largest commercial banking organization in Connecticut, has total assets of $1.4 billion and total domestic deposits of $1.2 billion, representing 8.0 percent of total deposits in commercial banks in Connecticut. Upon consummation of the proposed transaction, Applicant would remain the largest bank holding company in New England in terms of both assets and domestic deposits.

Applicant's nine banking subsidiaries operate in ten of the fourteen Massachusetts banking markets,[2] as well as in the Massachusetts portion of the Providence, Rhode Island, banking market. Colonial's sole banking subsidiary operates in seven of the ten Connecticut banking markets.[3] In-

1. Banking data are as of December 31, 1983.

2. These Massachusetts banking markets are Boston, Springfield, Worcester, New Bedford, Fall River, Cape Cod, Fitchburg-Leominster, Pittsfield, Greenfield, and Amherst-Northampton.

3. These Connecticut banking markets are Hartford, New Haven, Bridgeport, Waterbury, Danbury, Torrington, and Salisbury.

asmuch as none of Applicant's banking subsidiaries operates in Connecticut and Colonial's banking subsidiary does not operate in Massachusetts, the proposed transaction would not eliminate any significant existing competition in any relevant banking market.

The Board has considered the effects of this proposal on probable future competition and also has examined the proposal in light of the Board's proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[4] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition. After consideration of these factors in the context of the specific facts of this case, the Board concludes that consummation of this proposal would not have any significant adverse effects on probable future competition in any relevant market.

With respect to the seven banking markets in Connecticut in which Colonial operates, the record shows that there are numerous other probable future entrants into these markets. At least nine commercial banking organizations with assets over $1 billion, including five in Massachusetts (other than Applicant) and three in Rhode Island, can be identified as probable future entrants into the seven relevant Connecticut banking markets. In addition, in three of the seven markets (Bridgeport, New Haven, and Danbury), the market is not highly concentrated and in two other markets (Hartford and Salisbury), Colonial is not a

4. 47 *Federal Register* 9017 (March 3, 1982). Although the proposed policy statement has not been adopted by the Board, the Board is using the policy guidelines in its analysis of the effects of a proposal on probable future competition.

market leader. In view of these considerations and other facts of record, the Board concludes that elimination of Applicant as a probable future entrant into markets served by Colonial would not have a substantial anticompetitive effect in those markets.

With respect to the ten Massachusetts banking markets in which Applicant operates, two of these markets (Boston and Cape Cod) are not highly concentrated. With respect to the eight other relevant markets, the record discloses a minimum of nine commercial banking organizations, including four in Connecticut (other than Colonial) and three in Rhode Island, as probable future entrants into each of the markets.[5] On the basis of these considerations and other facts of record, the Board concludes that the elimination of Colonial as a probable future entrant would not have a substantial anticompetitive effect in the ten Massachusetts markets served by Applicant.

The financial and managerial resources of Applicant and Colonial are regarded as generally satisfactory, and their prospects appear favorable. Considerations relating to the convenience and needs of the communities to be served also are consistent with approval of the application.

Section 3(d) of the Act prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which the operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." (12 U.S.C. § 1842(d)). Based

5. Applicant has less than a 1 percent market share in the Providence, Rhode Island, banking market. Accordingly, the proposed merger's effect upon probable future competition in this market would be insignificant.

upon its review of the Connecticut interstate banking statute,[6] the Board concludes that Connecticut has by statute expressly authorized, within the meaning of the Douglas Amendment, a Massachusetts bank holding company, such as Applicant, to acquire a Connecticut bank or bank holding company, such as Colonial.[7]

This application raises a question under the United States Constitution concerning the constitutionality of a provision of the Connecticut interstate banking statute that excludes bank holding companies located outside of New England from acquiring banks in Connecticut.[8] The Board addressed the constitutionality of the Connecticut law in its Order approving the application of Bank of New England Corporation, Boston, Massachusetts, to acquire a bank in Connecticut.[9] After review of the record and in reliance on a detailed analysis of the constitutional issues included in an Appendix to the Board's order, the Board concluded that, while the issue is not free from doubt, there is no clear and unequivocal basis for a determination that the Connecticut statute is inconsistent with the Constitution.[10]

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6. 1983 Conn. Acts 411 (Reg. Sess.) entitled "An Act Concerning Interstate Banking," § 2.

7. *See Bank of New England Corporation*, 70 Federal Reserve Bulletin 374, 375 (1984).

8. New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

9. *Bank of New England Corporation, supra.* The Board addressed the constitutionality of a similar provision in Massachusetts law in approving the application of Hartford National Corporation, Hartford, Connecticut, to acquire a Massachusetts bank. *Hartford National Corporation*, 70 Federal Reserve Bulletin 353 (1984).

10. It is the Board's policy that it will not hold a state law unconstitutional in the absence of clear and unequivocal evidence of the inconsistency of the state law with the United States Constitution. *See NCNB Corp.*, 68 Federal Reserve Bulletin 54, 56 (1982); *Bank of New England Corporation, supra*, 70 Federal Reserve Bulletin at 376.

Subsequent to the Board's approval of those applications, the protestants petitioned for judicial review of the Board's orders on the sole ground that the Connecticut and Massachusetts interstate banking laws are unconstitutional.[11] While the court has expedited its review of those cases, the court has not yet issued an opinion regarding the merits of the protestants' claims. In the absence of a judicial determination regarding the constitutionality of the Connecticut interstate banking statute, the Board believes that it is appropriate in this case to apply the analysis articulated in the Bank of New England and Hartford National Corporation cases. Accordingly, on the basis of the Board's finding in those cases regarding the Connecticut statute, the Board has determined not to deny Bank of Boston Corporation's application on the grounds urged by the protestant that the Connecticut statute is unconstitutional.

In addition to seeking judicial review, the protestants in the Bank of New England and Hartford National Corporation cases petitioned the court to stay the effectiveness of the Board's orders pending judicial review. On April 24, 1984, the court granted the protestants' motions to stay the effectiveness of the Board's orders. In view of this action by the court, the Board has considered whether to stay the effectiveness of its action in this case pending the outcome of the litigation regarding the constitutionality of the Connecticut statute. The protestant in this case has not requested a stay, and under 5 U.S.C. § 705, the Board may not be authorized to stay its action absent a petition for

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11. *Northeast Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-4047 (2d Cir. filed March 27, 1984); *Citicorp* v. *Board of Governors of the Federal Reserve System*, Nos. 84-4051 and 84-4053 (2d Cir. filed March 30, 1984).

judicial review. Consequently, the Board has determined not to stay, on its own motion, the effectiveness of its decision in this case at this time.

Applicant has also applied, under section 4(c)(8) of the Act, to acquire two nonbanking subsidiaries of Colonial—Realty and Leasing. Neither of these subsidiaries conducts any business in Massachusetts. Two of Applicant's existing subsidiaries, FNB Financial Company, Boston, Massachusetts ("FNB"), and Firstbank Financial Corporation, Boston, Massachusetts ("Firstbank"), operate in Connecticut. FNB, which engages in commercial finance activities, derives $19.0 million in accounts receivable and inventory loans from Connecticut, representing only 0.4 percent of Applicant's total commercial loans. Firstbank, which engages in leasing activities, has lease balances outstanding from Connecticut customers of only $8 million, representing 4 percent of its lease portfolio.

The Board believes that this proposal would have only a minimal impact on existing competition among the nonbanking subsidiaries of Applicant and Colonial. Moreover, this proposal would have no significant effect on existing competition between Colonial's subsidiary bank and FNB. Given the limited scope of the activities of Applicant's nonbanking subsidiaries in Connecticut, the Board concludes that this transaction would not have any significant adverse effect on competition.

There is no evidence in the record to indicate that approval of this proposal would result in undue concentration of resources, unfair competition, conflicts of interest, unsound banking practices, or other adverse effects. Accordingly, the Board has determined that the balance of the public interest factors it must consider under section

4(c)(8) of the Act is favorable and consistent with approval of the applications to acquire these nonbanking subsidiaries.

Based on the foregoing and other facts of record, the Board has determined that the applications under sections 3 and 4 of the Act should be and hereby are approved. The acquisition of Colonial's bank subsidiary shall not be consummated before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority. The approval of Applicant's proposal to acquire Colonial's nonbanking activities is subject to the conditions set forth in Regulation Y, including sections 225.4(d) and 225.23 (b)(3) (12 C.F.R. §§ 225.4(d) and 225.23(b)(3)), and to the Board's authority to require such modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

By order of the Board of Governors,[12] effective May 18, 1984.

(signed) James McAfee

James McAfee
Associate Secretary of the Board

[SEAL]

12. Voting for this action: Chairman Volcker and Governors Partee, Teeters, Rice, and Gramley. Absent and not voting: Governors Martin and Wallich.

APPENDIX F

Order of the United States Court of Appeals for the Second Circuit Staying Its Mandate and Maintaining the Status Quo (August 9, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4047, 4051, 4053, 4081

NORTHEAST BANCORP, INC., et al.

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

for *Stay of Mandate and Maintenance of Status Quo*

Brief statement of the relief requested:

Stay of Mandate and Maintenance of Status Quo Pending Disposition by the Supreme Court.

ORDER

IT IS HEREBY ORDERED that the motion

be and it hereby is granted ~~denied~~.

George C. Pratt

Dudley B. Bonsal

Date—August 9, 1984

APPENDIX G

Order of the United States Court of Appeals for the Second Circuit Denying Motion to Vacate Order of the Board of Governors of the Federal Reserve System Staying Board's Approval of Bank of Boston Corporation Application (June 19, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4081

CITICORP, a Corporation,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

To Vacate Stay

Brief statement of the relief requested:

Bank of Boston Corporation ("BBC") requests that the Court vacate the order issued by the Board of Governors of the Federal Reserve System ("the Board") staying the effectiveness pending judicial review of its prior order approving BBC's acquisition of Colonial Bancorp, Inc. ("Colonial").

ORDER

IT IS HEREBY ORDERED that the motion ~~granted~~ denied.

Richard J. Cardamone

George C. Pratt

Dudley B. Bonsal

Date—June 19, 1984

APPENDIX H

Order of the Board of Governors of the Federal Reserve System Staying the Board's Order Approving Bank of Boston Corporation Application (June 11, 1984)

FEDERAL RESERVE SYSTEM

Bank of Boston Corporation

Boston, Massachusetts

Stay of Board's Order Approving Acquisition of a Bank Holding Company

By Order dated May 18, 1984, the Board approved the application of Bank of Boston Corporation, Boston, Massachusetts, to acquire Colonial Bancorp, Inc., Waterbury, Connecticut, and thereby to acquire Colonial Bank, Waterbury, Connecticut. The Board's approval of this interstate acquisition of a bank was made possible by the Connecticut statute authorizing, under certain conditions, the acquisition of Connecticut banks by bank holding companies located in other New England states.[1]

Citicorp, New York, New York, protested the application in a timely manner on the basis that the Connecticut interstate banking statute unconstitutionally discriminates againt non-New England bank holding companies. Citicorp has sought judicial review of the Board's Order by the United States Court of Appeals for the Second Circuit. It has also petitioned the Board to stay its Order pending resolution by the Second Circuit Court of Appeals of the constitutional issues raised by the Connecticut statute.

On March 26, 1984, the Board approved two other New England interstate transactions[2] despite protests from

1. 1983 Conn. Acts 411 (Res. Sess.) entitled "An Act Concerning Interstate Banking," § 2.

2. Bank of New England Corporation, Boston, Massachusetts, to merge with CBT Corporation, Hartford, Connecticut, 70 Federal Reserve Bulletin 374 (1984), and Hartford National Corporation, Hartford, Connecticut, to acquire Arltru Bancorporation, Lawrence, Massachusetts, 70 Federal Reserve Bulletin 354 (1984).

Citicorp and other protestants that raised constitutional issues identical to the issue in this case. The protestants sought judicial review of the Board's Orders in the previous cases before the United States Court of Appeals for the Second Circuit,[3] and on April 24, 1984, that Court stayed the effectiveness of the Board's Orders pending the Court's decision on the merits of the cases. In view of the decision of the Court of Appeals to stay the Board's prior Orders and the fact that this case raises the same substantive issues, and considering the factors relevant to a decision on a stay motion, the Board believes that the interests of administrative and judicial efficiency as well as considerations of fairness require the Board to grant the petition of Citicorp and to stay its Order approving the application of Bank of Boston Corporation to acquire Colonial Bancorp, Inc.

Accordingly, the Board hereby stays the effectiveness of its Order approving the application of Bank of Boston Corporation to acquire Colonial Bancorp, Inc., pending judicial review of this case by the United States Court of Appeals for the Second Circuit.

By order of the Board of Governors,[4] effective June 11, 1984.

(signed) JAMES MCAFEE

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

3. *Northeast Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-4047 (2d Cir. filed March 27, 1984); *Citicorp* v. *Board of Governors of the Federal Reserve System*, Nos. 84-4051 and 84-4053 (2d Cir. filed March 30, 1984).

4. Voting for this action: Chairman Volcker and Governors Partee, Rice, and Gramley. Absent and not voting: Governors Martin, Wallich, and Teeters.

APPENDIX I

Order of the United States Court of Appeals for the Second Circuit Staying Board's Orders Approving Bank of New England and Hartford National Corporation Applications (April 24, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4047

NORTHEAST BANCORP, INC. and UNION TRUST COMPANY,
Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

NOTICE OF MOTION

for *Stay of Respondent's Order*

Brief statement of the relief requested:

Petitioners request a stay of the order of the Board of Governors of the Federal Reserve System pending final determination of their constitutional challenges to the order.

ORDER

IT IS HEREBY ORDERED that the motion *granted* ~~denied~~. The record and briefs and joint appendix of the parties shall be personally exchanged and filed on or before May 4, 1984. The appeal shall be heard by the PM panel sitting during the week of May 7, 1984. The oral application by Hartford for relief from the stay is denied.

ELAINE B. GOLDSMITH, Clerk

by /s/

Edward J. Guardaro, Deputy Clerk

Hon. Irving R. Kaufman,

Hon. Thomas J. Meskill, CJJ.

Date—April 24, 1984

APPENDIX J
Order of the United States Court of Appeals for the Second Circuit Granting Northeast Bancorp, Inc. and Union Trust Company Leave to Intervene (April 23, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4053

CITICORP, a corporation,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

for *Leave to Intervene*

Brief statement of the relief requested:

Leave to intervene in the above-captioned matter.

ORDER

IT IS HEREBY ORDERED that the motion

be and it hereby is granted ~~denied~~

IRVING R. KAUFMAN

Date—4/23/84

APPENDIX K

The Commerce and Compact Clauses of the United States Constitution

Art. I, § 8, cl. 3:

> The Congress shall have Power . . .
> To regulate commerce . . . among the several states . . . .

Art. I, § 10, cl. 3:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .

APPENDIX L

The Douglas Amendment, 12 U.S.C. § 1842(d)

Limitation by State Boundaries

(d) Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

APPENDIX M

The Connecticut Act, 1983 Conn. Act 83-411 (Reg. Sess.) (enacted June 8, 1983)

AN ACT CONCERNING INTERSTATE BANKING.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) For purposes of sections 1 to 17, inclusive, of this act and unless the context otherwise requires:

(a) "Bank" has the same meaning given to that term in 12 U.S.C. Section 1841(c);

(b) "Bank holding company" has the same meaning given to that term in 12 U.S.C. Section 1841(a);

(c) "Commissioner" means the banking commissioner;

(d) "Connecticut bank" means any federally or state chartered bank which has its main office and principal place of business in Connecticut and is not directly or indirectly owned or controlled by any bank, savings bank, savings and loan association or bank holding company other than a Connecticut or New England bank, savings bank, savings and loan association or bank holding company;

(e) "Connecticut bank holding company" means any bank holding company: (1) Which has its principal place of business in Connecticut; (2) each of whose subsidiary banks has its main office and principal place of business only in Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont; and (3) which is not directly or indirectly owned or controlled by a bank holding com-

pany which (A) has its principal place of business in any state other than Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island, or Vermont or (B) owns or controls any subsidiary bank that has its main office or principal place of business in any state other than such states;

• • •

(h) "Control" has the same meaning given to that term in 12 U.S.C. Section 1841(a);

(i) "New England bank" means any federally or state chartered bank which has its main office and principal place of business in the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont and is not directly or indirectly owned or controlled by any bank, savings bank, savings and loan association or bank holding company other than a Connecticut or New England bank, savings bank, savings and loan association or bank holding company;

(j) "New England bank holding company" means a bank holding company: (1) Which has its principal place of business in the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont; (2) each of whose subsidiary banks has its main office and principal place of business only in Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont; and (3) which is not directly or indirectly owned or controlled by a bank holding company which (A) has its principal place of business in any state other than Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont, or (B) owns or controls any subsidiary bank which has its main office or principal place of business in any state other than such states;

• • •

(m) "Subsidiary" has the same meaning given to that term in 12 U.S.C. Section 1841(d).

Sec. 2. (NEW) Any New England bank holding company may, with the approval of the commissioner, establish or acquire and retain direct or indirect ownership or control of all or part of the voting stock of any Connecticut bank, Connecticut savings bank, Connecticut savings and loan association or Connecticut bank holding company, if the laws of the state in which the operations of the subsidiary banks of such New England bank holding company are principally conducted, within the meaning of 12 U.S.C. Section 1842(d), expressly authorize, under conditions no more restrictive than those imposed by the laws of Connecticut as determined by the commissioner, the establishment or acquisition and retention of direct or indirect ownership or control of all or part of the voting stock of banks, savings banks, savings and loan associations or bank holding companies having their principal places of business in such state by Connecticut bank holding companies. Any such establishment or acquisition by a New England bank holding company shall be effected in accordance with the laws of this state applicable to such activities, when conducted by Connecticut bank holding companies. If such New England bank holding company, by virtue of any action, ceases to be a New England bank holding company as defined in section 1 of this act, and it does not become a Connecticut bank holding company, as defined in section 1 of this act, the commissioner shall order such bank holding company to immediately divest itself of its direct or indirect ownership or control of the stock of any Connecticut bank, savings bank, savings and loan association or bank holding company acquired by it pursuant to this section.

Sec. 3. (NEW) A New England bank may, with the approval of the commissioner, purchase and retain direct or

indirect ownership or control of the stock of any Connecticut bank, Connecticut savings bank or Connecticut savings and loan association if the laws of the state in which such New England bank has its principal place of business expressly authorize, under conditions no more restrictive than those imposed by the laws of Connecticut as determined by the commissioner, the purchase and retention of direct or indirect ownership or control of the stock of any bank, savings bank or savings and loan association which has its principal place of business in such state by a Connecticut bank. Any such purchase shall be effected in accordance with the laws of this state applicable to such a purchase if made by a Connecticut bank. If such New England bank, by virtue of any action, ceases to be a New England bank, as defined in section 1 of this act, and it does not become a Connecticut bank, as defined in section 1 of this act, the commissioner shall order such bank to immediately divest itself of its direct or indirect ownership or control of the stock of any Connecticut bank, Connecticut savings bank or Connecticut savings and loan association acquired by it pursuant to this section.

* * *

APPENDIX N

The Massachusetts Act, Mass. Gen. Laws Ann. Ch. 167A § 2 (enacted December 31, 1982)

§ 2. Board of bank incorporation; acts requiring approval by board

Except with the prior written approval of the board of bank incorporation (1) no company shall become a bank holding company; (2) no bank holding company owning, controlling or holding with power to vote, directly or indirectly, twenty-five per centum or more of the voting stock of each of two or more banking institutions or, in the case of a bank holding company which is itself a banking institution, owning, controlling or holding with power to vote, directly or indirectly, twenty-five per centum or more of the voting stock of one or more banking institutions shall acquire direct or indirect ownership or control of any additional voting stock in any such banking institution or shall acquire direct or indirect ownership or control of any voting stock in any other banking institution if, after such acquisition, such bank holding company will, directly or indirectly, own or control more than five per centum of the voting stock thereof; (3) no bank holding company or affiliate thereof, other than a banking institution, shall acquire all or substantially all of the assets of a banking institution; (4) no bank holding company shall merge or consolidate with any other bank holding company; and (5) no bank holding company shall vote stock which it controls in a banking institution.

Notwithstanding the provisions of this section, an out-of-state bank holding company, with the prior written approval of the board of bank incorporation, may establish

or acquire direct or indirect ownership or control of more than five per cent of the voting stock of one or more banking institutions or bank holding companies; provided that the laws of the state in which operations of the subsidiary banks of such out-of-state bank holding company are principally conducted expressly authorized, under conditions no more restrictive than those imposed by the laws of the commonwealth as determined by the commissioner, the establishment or the acquisition of direct or indirect ownership or control of more than five per cent of the voting stock of banks, or companies controlling one or more banks in that state, by bank holding companies whose banking institutions principally conduct their operations in the commonwealth. Any such establishment or acquisition by an out-of-state bank holding company shall be effected in accordance with the laws of the commonwealth which are applicable to such activities carried out by bank holding companies. For the purposes of this section, the term "out-of-state bank holding company" shall have the same meaning as set forth in the Bank Holding Company, Act of 1956 (12 USC 1841 et seq.), but shall include only those companies which have their principal places of business in one of the states of Connecticut, Maine, New Hampshire, Rhode Island or Vermont and which are not directly or indirectly controlled, within the meaning set forth in said Bank Holding Company Act, by another corporation which has its principal place of business in a state other than the commonwealth or one of the states referred to above.

APPENDIX O

The Rhode Island Act, R.I. Pub. Law S. 0661 Sub. A (enacted May 17, 1983)

SECTION 1. Title 19 of the general laws entitled "Financial Institutions" is hereby amended by adding thereto the following Chapter 30:

CHAPTER 30

ACQUISITIONS BY OUT-OF-STATE BANKS AND BANK HOLDING COMPANIES

19-30-1. Definitions of Terms.—(a) The terms "bank", "bank holding company", "company" and "subsidiary" shall have the meanings set forth in the federal "Bank Holding Company Act of 1956", as amended, 12 U.S.C. Sec. 1841 et seq., except that "bank" shall also include a savings bank, building-loan association, and savings and loan association, whether organized with or without capital stock.

(b) The term "Rhode Island bank" shall mean a bank, whose principal office is located in this state.

(c) The term "out-of-state bank" shall mean a bank whose principal office is located (i) on and after the effective date of this act until July 1, 1986, in one of the New England states other than this state and which is not directly or indirectly controlled by another company, the operations of whose bank subsidiaries are not principally conducted in Rhode Island or one of the other New England states and (ii) on and after July 1, 1986 in any other state.

(d) The term "Rhode Island bank holding" shall mean a bank holding company which controls a Rhode Island

bank, provided that an out-of-state bank holding company which acquired control of one or more Rhode Island banks pursuant to section 19-30-2 shall not be deemed to be a Rhode Island bank holding company, unless operations of its bank subsidiaries are principally conducted in this state.

(e) The term "out-of-state bank holding company" shall mean a holding company, other than a Rhode Island bank holding company, the operations of the bank subsidiaries of which are principally conducted (i) on and after the effective date of this act until July 1, 1986 in one of the New England states other than this state, and which is not directly or indirectly controlled by another company, the operations of whose bank subsidiaries are not principally conducted in Rhode Island or one of the other New England states, and (ii) on and after July 1, 1986 in any other state.

(f) For the purposes of this act, the state in which operations of a bank holding company's bank subsidiaries are principally conducted is the state in which total deposits of all of its bank subsidiaries are the largest.

(g) The term "New England States" shall mean the Commonwealth of Massachusetts and the states of Maine, New Hampshire, Vermont, Connecticut and Rhode Island.

19-30-2. Acquisitions authorized.—The provisions of subsection (a) of this section 19-30-2 shall expire and be of no further force and effect as of July 1, 1985. The provisions of subsection (b) of this section 19-30-2 shall be effective as of July 1, 1985.

(a) An out-of-state bank or bank holding company may acquire direct or indirect ownership or control of more

than five percent of the voting stock of one or more Rhode Island banks or bank holding companies, if the following three conditions are met:

(i) The laws of the state in which such out-of-state bank is located or in which operations of the bank subsidiaries of such out-of-state bank holding company are principally conducted expressly authorize, under conditions no more restrictive that [*sic*] those imposed by the laws of Rhode Island, as determined by the board of bank incorporation, the acquisition by a Rhode Island bank holding company or a Rhode Island bank of direct or indirect ownership or control of more than five percent of the voting stock of banks located in such state or bank holding companies, the operations of the bank subsidiaries of which are principally conducted in such state.

(ii) such acquisition, including all of the terms and conditions thereof, shall have been approved in advance by (A) the affirmative vote of the holders of shares of capital stock representing at least two-thirds (or such greater percentage as may be required by the articles of incorporation or by-laws of such Rhode Island bank or bank holding company) of the outstanding voting power of such Rhode Island bank or bank holding company or (B) by 80% of the members of the board of directors (or such other applicable governing body) of such Rhode Island bank or bank holding company; and

(iii) such acquisition, including all of the terms and conditions thereof, shall have been approved in advance by the board of bank incorporation, which shall have issued a written order evidencing such approval. In determining whether to approve a proposed acquisition by

an out-of-state bank or bank holding company, the board of bank incorporation shall consider, in addition to such other factors as it may in its discretion determine, whether such acquisition shall promote the safety and soundness of the institution whose voting stock is to be acquired and the needs and convenience of the communities served by such institution. The procedures for notice and the conducting of hearings by the board of bank incorporation and the rights of appeal from decisions of such board shall be governed by the Rhode Island Administrative Procedure Act, Title 42, Chapter 35. Any Rhode Island bank or Rhode Island bank holding company which is the subject to an acquisition hereunder shall be a party to the proceedings of the board of bank incorporation and shall be entitled to seek judicial review of any final decision of such board.

(b) An out-of-state bank or bank holding company may acquire direct or indirect ownership or control of more than five percent of the voting stock of one or more Rhode Island banks or bank holding companies, provided that the laws of the state in which such out-of-state bank is located or in which operations of the bank subsidiaries of such out-of-state bank holding company are principally conducted expressly authorize, under conditions no more restrictive than those imposed by the laws of Rhode Island as determined by the board of bank incorporation, the acquisition by a Rhode Island bank holding company or a Rhode Island bank of direct or indirect ownership or control or more than five percent of the voting stock of banks located in such state or bank holding companies, the operations of the bank subsidiaries of which are principally conducted in such state.

* * *

APPENDIX P

The Congressional Record (Excerpts)
House, June 14, 1955

[Pages 8180-81]

MR. KEATING. I am always rather leery when I see in any bill provisions granting exceptions. Whenever any bill says that it is not to apply in certain instances, that should always put us on guard. In the bill before us, on page 10, section 6, subsection (c), we have a long list of instances in which prohibitions are not to apply. It is all very general language, but it always occurs to me that there may have been behind the scenes somewhere some effort made to employ such general language to achieve an objective specific in its application. Obviously we could not put in here any exception for banks in any one locality or region, but neither should we do by indirection what we would properly shrink from doing directly. I wonder if in the gentleman's substitute he has any such extensive exceptions as those listed beginning on page 10 under subsection (c).

MR. WOLCOTT. I have none of the exceptions to which the gentleman refers.

MR. KEATING. It seems to me that should commend it to our favorable consideration.

* * *

MR. KEATING. It strikes me that if we are going to enact a bill, which I think we need, we should enact one that applies throughout the Nation and equally to all institutions.

Mr. McDonough. That is exactly what the substitute bill does. These exceptions were inserted in this bill for the special convenience of those holding corporations whose names I have recited.

Mr. Brown of Ohio. Mr. Chairman, I rise in support of the amendment.

Mr. Chairman, when the Committee on Banking and Currency appeared before the Committee on Rules seeking a rule on this bill to send it to the floor, many of us were especially impressed by the fact that no two members of the legislative committee seemed to agree on what the provisions of this particular bill were or how they would apply. Grave questions arose in the Committee on Rules during the hearing as to whether or not this bill did not grant such exemptions as to favor the banks and financial institutions and holding companies in certain States and to work hardship on similar institutions in other States.

We were also impressed by the fact, as it was developed before the Committee on Rules, that the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corp., all of whom were referred to in the report, had not approved the particular measure but instead had approved the so-called original Robertson bill as introduced in the Senate, which now constitutes the substitute or the amendment now before us. In other words, the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corp. officials all found that the special amendment before us as a substitute to that bill does protect the interests of all concerned equally, everywhere in the United States, without favoritism to any, and is the type of legislation that would accomplish a worthwhile objective as described in this bill.

Therefore, it seems to me, Mr. Chairman, that if we want to enact legislation here that will not discriminate against some and in favor of others; if we want to enact legislation that meets the approval of those organizations or regulatory bodies within our Government in the executive branch charged with directing the activities of banks and other financial institutions, of examining and checking them to make sure that the rights of depositors and the rights of stockholders and the rights of the general public are fully and properly protected, then this particular substitute or amendment must be adopted. Certainly none of us here are qualified to pass upon all of the technical requirements of law affecting the banking institutions of this great country of ours. Certainly we should depend to a great extent upon the advice of these regulatory agencies I have just mentioned. Certainly we do want to enact legislation that will correct some of the abuses that have been mentioned such as those which now exist in Florida and are exempt under this law, and such as those that exist in Atlanta and Louisville and are exempt under the provisions of the bill we are now attempting to amend.

[Page 8184]

Mr. Smith. Let us consider the bill from the committee, then let us operate on that from the standpoint of amendments to correct things we do not like. For instance, I do not like the idea of exempting savings banks. I do not know why they are exempted in the bill. Nobody has told me. I do not like the exemptions. Let us treat everybody alike. I can see, though, that it is pretty hard for this Congress to say to an individual: Mr. Bailey, you cannot own a

certain amount of stock in the bank in your town and also own a certain amount of stock in the bakery in your town. That is dealing with the individual. I think it is a separate situation. But when you are dealing with a corporation, an artificial party that is subject to the most drastic kind of control, that is another matter.

MR. MCDONOUGH. Mr. Chairman, will the gentleman yield?

MR. SMITH of Virginia. I yield to the gentleman from California.

MR. MCDONOUGH. The gentleman said he thought we ought to treat all alike. Under the gentleman's premise does he agree with the exceptions that are provided in the bill submitted? There are three exceptions.

MR. SMITH of Virginia. I am ready to answer the question. If there is any discrimination in this bill, if there are exceptions that should not be in there, they ought to be taken out.

MR. MCDONOUGH. They are not in the substitute; they are in the committee bill.

MR. SMITH of Virginia. All right, you can take them out of the committee bill. Let us take them out of the committee bill. Let us make the bill apply to everybody, but do not apply that to a bill that we do not know what is in it. I have great confidence in the gentleman from Michigan, but in a matter of this kind I want to be convinced myself from a study of the bill, and we have not had that opportunity.

Senate, April 24, 1956

[Pages 6860-61]

PENDING AMENDMENT PREVENTS BANK ACQUISITION BY OUT-OF-STATE HOLDING COMPANY UNLESS STATE LAW EXPRESSLY PERMITS

MR. DOUGLAS. Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States. At present no State specifically grants such permission. Therefore the immediate practical effect would be to bar the expansion of bank holding companies across State lines. But the amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided. If they were to do so, then such expansion would be subject to the rules and judgment of the Federal Reserve Board.

Even with my amendment, the Federal Reserve Board would still have final jurisdiction over the acquisition of banks or bank holding companies within a given State, that is, intrastate acquisitions. If and when individual States permitted a bank holding company from another State to acquire assets across State lines, then the Federal Reserve Board would have final jurisdiction in those cases as well.

I wish to repeat that, so far as interstate acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other States, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

Anyone who favors States rights, it seems to me should support my amendment. I am not urging it on that ground, however. I believe in a somewhat unified banking system. However, so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so.

* * *

MR. BRICKER. Mr. President, I wish briefly to discuss the amendment offered by the Senator from Illinois [Mr. DOUGLAS], not particularly as it affects the rights of the States, although I did serve for many years in my State in a capacity which afforded me opportunity to consider attempts to prevent discrimination by one State against another, the tendency, manifested again 2 years ago to Balkanize State jurisdictions, and matters related to constitutionality, and so forth, and I believe constructive service was rendered in that field. However, I consider a constitutional question to be involved in the amendment submitted by the Senator from Illinois.

Mr. President, the amendment proposed by the Senator from Illinois was considered by the Banking and Currency Committee and was rejected by the committee. In fact, only four votes were recorded in favor of the proposal. The Federal Reserve Board, the Comptroller of the Currency and the Federal Deposit Insurance Corporation are all opposed to this amendment, because, in effect, it con-

stitutes an absolute prohibition against future expansion by bank holding companies. I am sure it is obvious that every bank holding company in the country is opposed to this punitive proposal.

I stated earlier the procedure under S. 2577 for the Federal Reserve to consider every proposed acquisition of additional banks whether within the State or across State lines. Both types of acquisitions are treated the same. Under the bill, a bank holding company must obtain prior approval from the Federal Reserve Board before it can acquire a bank. The Federal Reserve Board in considering an application for an acquisition must take into consideration five factors. These factors are, first, the financial history and condition of the company or companies in the banks concerned; second, their prospects; third, character of their management; fourth, convenience, needs, and welfare of the communities in the area concerned; and, fifth, whether or not the effect of such acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

The last factor I named is the most important and requires the Federal Reserve Board to consider the question of the public interest and the preservation of competition in the field of banking. This provision gives the Federal Reserve Board power to present undue concentrations of banking activities and at the same time permits the strengthening and expansion of banking facilities when needed.

The Douglas amendment prohibits the acquisition of a bank outside the home State of a bank holding company unless the laws of the State to be entered specifically author-

ize such acquisition. I submit, Mr. President, that no State in this country has enacted laws along this line. So the effect of the Douglas amendment is to absolutely prohibit a bank from crossing State lines. This proposal suggests that bank holding companies are evil per se and that any further growth should be prohibited. The amendment is another attempt to force bank holding companies out of business. This is contrary to the theory of the Senate bill which seeks to regulate bank holding companies and not to punish them.

Some statements have been made to the effect that this amendment protects States' rights. I believe that I am as strong a States rights advocate as any Member of this body. However, this amendment forces States to take legislative action to protect themselves and thus is clearly a derogation of States' rights.

Section 7 of S. 2577 preserves the true States' rights in regard to this question. The bill reserves to the States their present authority to regulate bank holding company operations within their borders and does not force the States to take any action. The committee believes that this provision is an adequate preservation of the rights of our States.

I should also like to point out that the Douglas amendment runs counter to the policy of the National Bank Act and our dual system of National and State banks. The National Bank Act recognizes the exclusive jurisdiction of the Federal Government over national banks just as the States have exclusive jurisdiction over State banks. The branch banking law is cited as a precedent for giving powers to States over national banks. The branch-banking law is the only major exception to the general rule that the Federal Government has exclusive jurisdiction over national banks.

However, it must be remembered that prior to the McFadden Act of 1927, national banks did not have statutory authority to establish branches. The purpose of the McFadden Act and the Banking Act of 1933 was to permit national banks to compete with State banks in States which authorized State banks to have branches. Congress merely gave national banks equal powers with State banks in respect to branch offices. These acts enlarged the powers of national banks rather than restricted them. Certainly it cannot be argued successfully that the branch-banking law is a precedent for permitting States to place restrictions on national banks and take away privileges they now enjoy.

In conclusion, Mr. President, I wish to reiterate that the committee rejected this amendment. The Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and all the bank holding companies are absolutely opposed to it, and I hope the Senate will reject the amendment in the interest of sound banking and the preservation of the competitive system of banking in our country as between the various States and as between the Federal Government and the States.

Senate, April 25, 1956

[Page 6934]

MR. JOHNSON of South Carolina. What was the position taken by the independent bankers of the Nation?

MR. CAPEHART. I do not know that the independent bankers ever testified on this particular subject. I believe I know what the independent bankers want; and I am for it. They want to prevent bank holding companies from expanding, and they want to bring bank holding companies within the same law and under the same rules and regulations under which the independent bankers must live. In all fairness and honesty, I presume they might take the position that if such bank holding companies were permitted to retain their nonbanking asset companies, that would make them a little stronger, because it is a fact that the bank holding company would receive any dividends which might be declared.

On the other hand, this is what would happen. If the bill as written should become law, the holding companies would dispose of their nonbanking assets and another group would acquire them. Either that, or they would siphon them off and give them to their present stockholders. The nonbanking asset companies would not be eliminated. They would not go out of business. They would stay in business. Some bank would handle their banking affairs. Under the bill it will not be the bank holding companies that will own them; and an independent bank somewhere will lend them money.

I cannot make up my mind that we should do for a few what we would not do for all. I cannot quite understand that sort of legislation.

The argument is made that we will freeze the bank holding companies if they do not want to dispose of their nonbanking assets. Of course, that is true. However, under the proposed legislation we are pretty much freezing the banking system of America, in order to get at the evil which has developed and to which the small banks object—and I think rightfully so. In other words, we will be freezing the American banking system. We will practically freeze the banking business and deny any new banks the opportunity of entering the field and competing with the established banks.

I believe the Senate ought to know that before it votes on the bill. It ought to know that it will be freezing the situation.

I suppose I could talk for some time on this amendment, but I do not know that I could cover the ground any better than I already have done. The question involved is very simple. It is whether we wish to treat all the way we are now treating a few. I wish somone would tell me, without becoming emotionally upset, in what way a small banker or independent banker will gain anything by our not permitting bank holding companies to retain their holding if they cannot lend them any money.

House, April 26, 1956

[Page 7165]

THE SPEAKER. Is there objection to the request of the gentleman from Kentucky?

MR. MARTIN. Mr. Speaker, reserving the right to object, do there Senate amendments make any material changes in the legislation as it was passed by the House?

MR. SPENCE. I think not. They make some change, but no material change. I can say that the independent bankers are very much interested in the bill and are anxious to have the bill passed.

APPENDIX Q

Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 Before the Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. (1955) (Excerpt)

CONTROL OF BANK HOLDING COMPANIES

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON BANKING AND CURRENCY
UNITED STATES SENATE

EIGHTY-FOURTH CONGRESS

FIRST SESSION

ON

S. 880, S. 2350, and H. R. 6227

BILLS TO PROVIDE FOR THE CONTROL AND REGULATION OF BANK HOLDING COMPANIES AND REQUIRE DIVESTMENT OF THEIR NONBANKING INTERESTS

JULY 5, 6, 7, 11, 12, AND 14, 1955

Printed for use of the Committee on Banking and Currency

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WEDNESDAY, JULY 6, 1955

UNITED STATES SENATE,
COMMITTEE ON BANKING AND CURRENCY,
SUBCOMMITTEE ON BANKING,
Washington, D. C.

The subcommittee met, pursuant to recess, in room 301, Senate Office Building, at 10:15 a. m., Senator J. Allen Frear, Jr., acting chairman of the subcommittee, presiding.

Present: Senator Frear.

Also present: Senators Bricker and Holland.

• • •

Statement of John T. Noonan, Counsel, Baystate Corp., Boston, Mass.

• • •

MR. NOONAN. . . .

Passing on, the second objection I will not linger too long on. The second objection is the restriction of bank holding companies to the acquisition of banks in the States where their principal offices are located. Now, Baystate Corp. owns no banks not located in Massachusetts. We have no present plans of acquiring any banks outside of Massachusetts. We are registering our objection to this requirement in the bill or this limitation in the bill largely because we feel that it is extremely unfair to a small State such as Massachusetts.

SENATOR BRICKER. You are addressing yourself now to the Spence bill?

MR. NOONAN. Yes; to H. R. 6227.

Perhaps this protest is engendered merely by that feeling that small States have that they are frequently discriminated against. We border New York State on our

west. New York State is some 6 or 7 times our size. Yet if this bill becomes law a bank holding company may operate in all of New York State in an area some 6 or 7 times our size and with a population many times more than that, while we are limited to the smaller area of Massachusetts.

If you go further west, the situation is accentuated. California is 20 times or more the size of Massachusetts. Texas is 30 times or more.

We just feel, although we have no present intention of going outside of Massachusetts, we shouldn't sit idly by and not raise our voices in protest to a limitation that would operate, as we think, in a discriminatory way against a bank holding company organized and operating in Massachusetts and apply even more strongly to an even smaller State like Rhode Island, and so on.

SENATOR FREAR. Is it not the intention of this H. R. 6227 to limit bank holding companies? I think that is the intention of the act; is it not?

MR. NOONAN. I think it is, Mr. Chairman, and the feeling I would have about that is that that in and of itself may not be an improper or inappropriate purpose, but I believe the approach should be a reasonable one, and I am speaking without giving too much thought but a trade-area approach such as a Federal Reserve district for instance I think could be defended quite logically whereas State lines are historical accident.

Massachusetts is a little State because it is an old State, and why should that historical accident serve today to penalize them?

SENATOR FREAR. Of course, I am sure you are proud of the State of Massachusetts. Delaware is the next smallest State, and there is no person who has any more pride in this State that [*sic*] I.

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APPENDIX R

Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. (1953) (Excerpts)

BANK HOLDING LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON BANKING AND CURRENCY

UNITED STATES SENATE

EIGHTY-THIRD CONGRESS

FIRST SESSION

ON

S. 76 and S. 1118

BILLS TO PROVIDE FOR THE CONTROL AND REGULATION OF BANK HOLDING COMPANIES, TO REQUIRE DIVESTMENT OF NONBANKING ASSETS, AND FOR OTHER PURPOSES

PART 1

JUNE 10, 11, AND 12, 1953

Printed for the use of the Committee on Banking and Currency

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* * *

THURSDAY, JUNE 11, 1953

UNITED STATES SENATE,
COMMITTEE ON BANKING AND CURRENCY,
Washington, D. C.

The committee met, pursuant to notice, at 10:05 a. m., in room 301, Senate Office Building, Senator Homer E. Capehart, chairman, presiding.

Present: Senators Capehart, Bricker, Bennett, Bush, Payne, Robertson, Sparkman, and Frear.

* * *

STATEMENT OF D. EMMERT BRUMBAUGH, PRESIDENT, INDEPENDENT BANKERS ASSOCIATION OF AMERICA

MR. BRUMBAUGH. My name is D. Emmert Brumbaugh, of Claysburg, Pa., and I am president of the Independent Bankers Association of America. I am also president of the First National Bank, Claysburg, Pa.; a former secretary of banking of the Commonwealth of Pennsylvania, and I am a former Member of Congress from the Keystone State during which time I served as a member of the House Banking and Currency Committee.

In appearing before this committee I am representing 5,212 banks out of the 13,439 commercially insured banks in the Nation, of which 9,456 have less than $5 million in assets. Among these banks approximately 8,500 are State banks and 4,900 are national banks. Our member banks are also members of the American Bankers Association.

The Independent Bankers Association of America is composed of the smaller banks of the Nation that are fight-

ing for their existence because of the monopolistic trend of present-day banking.

The chief offenders in the promotion of this monopolistic trend are the bank holding companies that circumvent the law by establishing "branches" across State lines when the banks themselves do not have such a privilege.

* * *

MR. BRUMBAUGH. The organization of this Independent Bankers Association was brought about due to the continual expansion of holding companies in certain sections of the Nation. With the result that many of the independent banks were being taken over, and had it not been for this organization, by this time there is some possibility that there would have been nationwide banking by holding companies.

SENATOR BUSH. So really, the primary purpose of your organization is to fight this holding-company trend?

MR. BRUMBAUGH. That is correct.

THE CHAIRMAN. You say here the chief offenders in the promotion of this monopolistic trend are the bank holding companies that circumvent the law by establishing branches across the State lines where the bank themselves do not have such privilege?

MR. BRUMBAUGH. That is correct.

THE CHAIRMAN. Can you elaborate a little more on that?

Mr. BRUMBAUGH. I intended to do that a little later on.

If you ask me that question at the close, I think I can explain it a little further to you.

THE CHAIRMAN. I think it is a very important question.

MR. BRUMBAUGH. I have some explanation on that particular subject.

THE CHAIRMAN. What you are saying is that holding companies can do what the banks themselves are not permitted to do?

MR. BRUMBAUGH. That is absolutely correct. They are operating in many States where the State law does not permit branches.

THE CHAIRMAN. You mean if I own a bank in a town X in State X, and I wanted to organize and have some branch banks within that State, that the State laws prohibit it, and yet if I was a holding company in some other State, that I could come in—

MR. BRUMBAUGH. You could buy a bank in that State, and run it as a separate banking institution. There is nothing to prevent the holding companies from going in that State.

THE CHAIRMAN. One or a dozen?

MR. BRUMBAUGH. That is correct.

THE CHAIRMAN. Suppose you proceed?

MR. BRUMBAUGH. Speaking of holding companies before this committee in 1950, Mr. Thomas B. McCabe at that time chairman of the board of the Federal Reserve Bank, said:

> The potential evil of unlimited expansion by bank holding companies is a very serious one. The holding-company device is a readily available instrument for acquiring as many banks as a holding-company management has or can raise the funds to purchase. In some instances the acquisition may occur simply as a result of an exchange of stock of the holding company for that of a bank.
>
> As each new bank is thus added to those already a part of the holding-company system, such bank automatically becomes in effect, though not in name, a

branch of that banking system. Gradually or precipitately, as the case may be, the holding company may obtain and control a greater and greater percentage of the banking offices in a particular area.

It may become the dominant banking influence in such an area. Indeed, it may even be possible in this manner for the holding company to extend its banking power to monopolistic proportions.

In the 1945 report of the Federal Deposit Insurance Corporation monopoly in banking was deplored in the following language:

> Monopoly in the banking business must be carefully guarded against. Only under competitive conditions will the banking system satisfactorily discharge its function of allocating credit to those who can make the most efficient use of it.

Mr. Chairman, the Independent Bankers Association heartily endorses the Capehart bill, S. 1118, because it will prevent further invasion of State rights by bank holding companies, and halt monopolies in the field of banking.

For example, the Transamerica Corp. was responsible for the establishment of 700 branch banks in California with over $8 billion in assets. While it has divested itself of its holdings of stock in the Bank of America it still operates and has controlling interest in banks in five States.

Another example is the First Security Corp. of Ogden, Utah, which now has over 40 offices, some in States where National and State banks are prohibited from establishing branches. This corporation has added several banks to its list within the year.

The First Bank Stock Corp. of Minneapolis, Minn., operates 76 offices in such States as Minnesota, Montana,

North Dakota, and South Dakota where in 3 of these States branch banking is prohibited.

The Northwest Bank Corp. of Minneapolis, Minn., has 91 subsidiary banks in 7 States of which 6 of the States prohibit branch banking.

The Equity Corp. of New York operates 49 offices in 7 States and the District of Columbia despite the fact that many of these States prohibit branch banking.

I have brought these holding companies to your attention because they represent the wide scope of territory they are covering and to convince you that they are without question of doubt circumventing the law by establishing branches across State line in defiance of State and National banking regulations.

* * *

FRIDAY, JUNE 12, 1953

UNITED STATES SENATE,
COMMITTEE OF BANKING AND CURRENCY,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a. m., in room 301, Senate Office Building, Senator Homer E. Capehart, chairman, presiding.

Present: Senators Capehart, Bennett, Bush, Beall, Payne, and Douglas.

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STATEMENT OF HARRY J. HARDING, PRESIDENT, INDEPENDENT BANKERS ASSOCIATION OF THE 12TH DISTRICT

MR. HARDING. Mr. Chairman, and gentlemen of the committee, first of all, I would like to submit for the record a statement which Mr. Emmert Brumbaugh intended to propose today, expressing the views of the National Association of State Supervisors, which organization has wholeheartedly and strongly endorsed the Capehart bill.

The supervisors have charge of supervising, as well as granting charters to banks in the States, and under their supervision they have about two-thirds of the banks of the country.

THE CHAIRMAN. Have all of the State examiners endorsed this bill?

MR. HARDING. I cannot say that, individually, but the association has, and as far as I understand, all supervisors have concurred in that.

THE CHAIRMAN. All State supervisors?

MR. HARDING. Yes, sir; they have all concurred in that.

THE CHAIRMAN. And the National Association of State Supervisors has likewise endorsed S. 1118?

MR. HARDING. That is correct, sir, wholeheartedly and strongly.

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MR. HARDING. . . .

The hearings on the two bills prepared by the Federal Reserve Board, S. 829 and S. 2318, were productive of many suggestions by both proponents and opponents for improving these bills. Out of these hearings also has come a better understanding of the problem by all concerned, and we independent bankers are deeply grateful to this

committee for the time is [*sic*] has given to the solution of the problem. While it seems some differences sometimes cloud the overall purposes to be accomplished by this legislation, it is our fervent hope that the present hearings will be pushed to a final conclusion.

We have pointed out that the problem stems from the ability of a holding company to evade and circumvent our Nation's banking laws. Legitimatizing an evasion of laws, even in a restricted manner, we feel is no way to cure an evil. The first step, it seems to us, is to agree that the way to end evasion and circumvention of our country's banking laws is to close the loopholes that permit such evasion. That is the purpose of S. 1118. It is a direct and moderate approach. It does not compel the dissolution of bank holding companies nor does it prevent the organization of new companies. It does maintain the autonomy of the separate States as to banking and erects a barrier that will protect a State against invasion by an outside holding company.

Senator Douglas raised a question here a moment ago, whether a State would prevent an outside holding company from coming into a State, and the answer was "No." That was brought out very definitely in the testimony on S. 2318, when Colonel Ely, past president of the Virginia Bankers Association, stressed that point.

It imposes no additional regulations or controls over banks that are not holding companies or subsidiaries of bank holding companies. It delegates discretionary authority to a minimum.

On that point, we are strongly against any discretionary authority in any agency.

It has been pointed out by several supporters of S. 1118 that there are certain fundamentals that seemingly ought to be embodied in any bill attempting to meet the bank holding company problem:

1. Banks cannot operate nonbanking businesses. The management of a bank should not be able to evade this provision of existing laws by the bank holding company device.

2. Banks cannot operate branches across State lines. The holding company device should not be used by a bank to acquire additional banks in other States in circumvention of this restriction.

3. Banks can establish additional offices or branches only in conformity with the laws of their State, and only with the approval of the appropriate supervisory agency. These specific limitations on the expansion of banking offices should not be possible of evasion through the holding company device.

S. 1118 accomplishes all three of these objectives.

APPENDIX S

H. R. Rep. No. 609, 84th Cong. 1st Sess. (1955) (Excerpt)

BANK HOLDING COMPANY ACT OF 1955

MAY 20, 1955—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SPENCE, from the Committee on Banking and Currency, submitted the following

REPORT

[To accompany H. R. 6227]

The Committee on Banking and Currency, to whom was referred the bill (H. R. 6227) to provide for the control and regulation of bank holding companies, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

THE NEED FOR BANK HOLDING COMPANY LEGISLATION

INTRODUCTION

The need for immediate legislation which would at the same time control the future expansion of bank holding companies and force them to divest themselves of nonbanking business has been established to the complete satisfaction of your committee. It held exhaustive public hearings on H. R. 2674 (since superseded by H. R. 6227) from February 28 through March 9, 1955. Executive sessions extended from April 20 to May 13. The views of the Fed-

eral Reserve System were presented by the Honorable William McChesney Martin, Chairman of its Board of Governors, while those of the Office of the Comptroller of the Currency were presented by the Honorable Ray M. Gidney. Other witnesses representing all shades of opinion in regard to bank holding companies appeared and were afforded every opportunity to set forth their views. All witnesses were subjected to unusually lengthy and searching interrogation by the membership of your committee. The printed hearings, including appropriate exhibits, cover 645 pages.

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The four fundamental reasons for enacting this legislation are set forth below.

BANK HOLDING COMPANIES THWART NATIONAL BANKING POLICY

While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks.

Repeatedly Congress has been urged to break down the restrictions in the national banking law regarding branches of national banks. Congress has been urged to permit branches, regardless of State bank laws, on a trade area basis, on an interstate or Federal Reserve district basis, and in fact on a nationwide basis. Each time, however, Congress has declared its approval of the American system of local independent and competitive banks, and has left the matter of branches to the States to determine, each State for itself. In spite of these rebuffs, those who have

sought to concentrate banking control into fewer and fewer hands have been able, in certain areas of the country, to accomplish their purpose to a substantial extent through the holding company device, acquiring control of a group of banks which, can thereafter be operated, in effect, as branches.

The opponents of H. R. 6227, it is true, have contended that to base holding company legislation on branch banking law is wrong, because there is a difference between branches and affiliated, or subsidiary, banks. Great stress has been placed on their difference in form, which everyone of course recognizes. Your committee feels, however, in a large measure they are differences without a distinction. Other than in form, what is the practical difference between a branch and a bank the stock of which is owned by a holding company that can select the bank's directors and change them at its pleasure, even holding repurchase rights to the directors' qualifying shares; that can hire and fire the bank's personnel and otherwise supervise its operations; that can make its investments, handle its insurance, buy its supplies, originate and place its advertising; can pass on its loans to local firms and individuals, usually receiving a fee for services performed?

Bankers certainly should know whether bank holding company subsidiaries can in effect be operated as branches. A bankers' association asked the bankers of the country this question: "Do you consider holding company banking, in effect, branch banking"? More than 97 percent of the replies were "Yes."

Your committee believes it is obvious that the declared will of Congress in favor of independent competitive banking is being thwarted by indirect branch banking, through the mechanism of the holding company.

APPENDIX T

Report of the President (1981) (Excerpt)

Chapter 7

The McFadden Act and the Dual Banking System

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III. *Branching and Bank Acquisitions: Some Reform Alternatives and Dual Banking*

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Geographically Limited Expansion

The second policy reform option, Congressional permission for national banks and state banks to branch statewide *and* across state lines within standard metropolitan statistical areas or within natural market areas in states contiguous to their main office, would impact the dual banking system in one important respect. The competitive equality between national and state banks would not be disturbed. However, the role of the state regulator would change in the sense that he would have to collaborate or cooperate with his counterparts in adjacent states to decide state bank branch applications and provide for examination of the branches in the interstate network. Presumably, a state bank seeking to establish a branch office in an adjacent state would need the approval of the home state regulator and the regulatory authority in the adjacent jurisdiction. The FRB and the FDIC would

continue to have veto power over state bank branch applications that they currently possess in the single state framework.

Congress need not work out the details of how the state regulators will coordinate their supervisory activities in the branching area. Indeed, the state banking system might ultimately be strengthened to the extent that state regulators are influenced or impelled by Congressional branching reform to resolve and coordinate their supervisory policies and strategies.[1] It is also relevant to note that two Federal agencies, the FRB and FDIC, help to cement together the 50 disparate state banking jurisdictions in the process of implementing Federal banking laws in a variety of areas. They could play a similar role on branching.

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1. One state supervisor, Mr. Richard Francis of Michigan, has recently testified that financial institutions must be given more liberal branching powers to avoid going "the way of handloom weavers in nineteenth century England." Mr. Francis suggested that the Federal government should encourage interstate compacts so that people in metropolitan areas could be served in their workplace and residence. See, Hearings on Federal Branching Policy Before Subcommittee on Financial Institutions of Senate Committee on Banking, Housing and Urban Affairs, 94th Congress, 2d Session 105, 109 (1977).

Chapter 8

Foreign Banks in the U.S. and the McFadden Act

This chapter explores foreign bank operations in this country and provides a foundation for drawing conclusions on how foreign bank activity affects McFadden Act reform. It also summarizes key provisions of national banking law, state branching statutues [*sic*], and statistics on foreign bank operations in the U.S. By drawing attention to the problem of interstate branching, foreign banks have highlighted the principal issue which regulators must address as financial corporations compete to expand in more sophisticated markets.

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VIII. *Foreign Banks and the McFadden Policy Options*

Partial Liberalization of Current Geographic Restrictions

Expansion Limits by Market Concentration. This option allows interstate expansion into those markets where the market share of total banking business has become concentrated among two or three leading banks. "Concentration" usually measures the distribution of total deposits and/or total banking assets between leading financial institutions in the relevant market area. However, such percentages may be misleading because concentration does not necessarily indicate too few bank offices, inadequate financial services, or high costs to the consumer. Concentration does normally indicate greater chances of cartelization or trends toward monopoly, which raises the

probability that the provision of credit and financial services will become suboptimal.

The concentration measures should work as a trigger mechanism; interstate branching (entry for out-of-state competitors) would be permitted when concentration rose above defined maximum percentages in relevant market areas.

a. *Difficulties and Disadvantages.*

The main problem is defining "market concentration" in a way which allows bank expansion to areas able to support new entrants and where new offices are needed. The simple (traditional) measure of concentration does not measure whether a market is underbanked or overbanked.[1] Therefore expansion by market concentration, as traditionally defined, may work to increase the number of offices (new entrants via *de novo* branching) in areas where office numbers may be close to optimal.[2] Refining the definition of concentration to take account of the number of bank offices poses statistical problems—measuring offices per capita does not guarantee profitability in low income urban areas, and measuring per capita personal income per office is probably inequitable.[3] Restricting interstate ex-

1. Underbanked does not mean underserved or inconvenienced; although liberal branching usually leads to greater concentration, it also usually creates more bank offices per capita. [See Longbrake, page 159, (*JBR*, 1973); Jacobs (1965) and Anderson (1964)].

2. The counter-argument is, of course, that the market can always accomodate a more efficient competitor, *i.e.*, that the new offices would be more efficient than the existing ones.

3. For suggested methods of measuring the optimal number of offices, see Joseph J. Horton, "Florida Banking", in *Business and Economic Dimensions*, December 1969 and "A Comparative Evaluation of the Adequacy of Florida Banking," Working Paper 69-11, Federal Deposit Insurance Corporation, 1972.

pansion to "concentrated" areas prevents new entrants from penetrating markets where their competition would bring more varied services, greater efficiency, or improve consumer convenience. For example, in unconcentrated unit banking states, no new out-of-state entrants would be allowed in to bring economies of scale,[4] or to increase the number of banking offices for consumer benefit.

A principal problem with the "expansion to concentrated markets only" option is that those markets might seldom be attractive to foreign and U.S. banks. Concentration often indicates economically stagnant or slow-growth markets. The difficulty of gaining new market share [*sic*], absent divestiture of existing branches to the new entrant makes concentrated markets even less attractive.

The market concentration option maximizes neither ease of entry nor ease of exit in the defined concentrated markets.

Finally, if expansion to concentrated areas is carried out by BHC acquisition, concentration does not necessarily decline. The acquired bank would hold the same market percentage as before of assets and liabilities. (Concentration *would* be reduced if the BHC built up a small bank's market share with new management, technology and expansion capital.)

b. *Advantages.*

First, it is an easy option to justify, based on the obvious relation between concentration and the likelihood of monopoly or cartelization. Second, it would direct expansion capital towards states which already have liberalized

4. Specifically, scale economies for financial services easily centralized at the head office (business loans, real estate loans, sale of securities); *cf.* Longbrake, *JBR*, 1973, 305-306.

branching. Third, "entrenched" banks (those holding a large percentage of the market) might be more able to compete with the new competitors, large foreign or U.S. banks, than other banks under other options. Fourth, it affects fewer market areas and generates less political opposition than complete repeal. Furthermore, by definition, interstate expansion based on market concentration works to reduce costs of credit by introducing new competitors who reduce market power. There is little evidence that new branches would be insensitive to local credit needs.[1]

c. *Conclusions.*

In all cases under this option, foreign banks increase the likelihood that new entrants will expand into markets opened by the concentration trigger mechanism. Insofar as their marginal utility from retail deposits may exceed that of many U.S. banks, foreign banks may more easily justify the costs of interstate expansion to distant concentrated areas. There are no data to foresee whether foreign banks would choose *de novo* branching or BHC acquisitions to enter concentrated markets. If via the BHC, it is uncertain whether they would have management expertise and confidence to purchase "turnaround" cases, *i.e.*, banks which face sale or continued loss of market share. Clearly the regulatory agencies approving BHC expansion into a concentrated area would look to the purchaser's ability and intent to reduce concentration.

1. See Ernest Kohn, "Branch Banking, Bank Mergers and the Public Interest," New York State Banking Department, January 1964. Kohn studied U.S. bank branches, but it is assumed, as specified at the outset, that foreign branches would pursue the same business as domestic bank branches.

Expansion by Bank Holding Company Only. Under this option interstate expansion takes place via the organizational form of a BHC rather than via *de novo* branching; the McFadden Act remains law and prevents building branch networks, both interstate and intrastate but the Douglas Amendment, specifically Section 3(d) of the BHC Act of 1956, is repealed or modified to permit BHCs to own banks outside the home state. BHCs would be able to purchase banks in other states provided the acquisition violated no state laws; hence this option has both the advantage and disadvantage of being easily avoided by concerned protectionist state legislators.[1] The "BHC Only" option could be implemented in several ways, some of which are suggested below.

a. *Permit Interstate Acquisition Nationwide.*

This change repeals Section 3(d) (Douglas Amendment) completely, permitting BHCs to acquire banks beyond their home state. Antitrust laws would still apply, as well as possible state standards which restrict BHC expansion, provided those standards did not discriminate

1. The states' rights issue here centers around Section 7 of the BHC Act of 1956, which retains for states "such powers and jurisdiction which [they] now [have] or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." Congressional intent was to preserve state jurisdiction over the form of its banking structure, which includes the right to legislate on BHC operations. Court decisions seem to support nondiscriminatory state situations. For out-of-state acquisitions, if Section 3d were repealed court decisions seem to support that states could prevent out-of-state BHC acquisitions, unless the state statute is discriminatory. In essence, the state can altogether prohibit BHCs, or it can restrict them, but it cannot discriminate against out-of-state BHCs. (For further discussion see *A Study of Interstate BHCs*, Golembe Associates, Washington, D.C., May 1979).

against out-of-state BHCs. (State silence on BHC entry would not suffice.) Foreign banks would act as large U.S. BHCs.

b. *Permit Interstate Acquisition Over Natural Geographic Areas.*

Natural geographic areas means, in practice, natural markets usually defined as the larger SMSAs which straddle state boundaries (see Appendix B). Unit banks in smaller SMSAs or rural areas would lie outside the natural market area and be protected from BHC acquisition. Foreign BHCs would probably prefer buying banks in larger SMSAs (*e.g.*, population exceeding 2 million), so this option does not prevent foreign banks from competing for takeovers.

c. *Permit Interstate Acquisitions in Selected Markets.*

This method permits entry into those markets where the public benefit and convenience would be served by allowing out-of-state banks to compete. For example, as discussed under the market concentration option, BHCs could be permitted into new state markets if it were seen they would revitalize a marginal competitor to reduce market concentration. A different variation would allow BHCs into any market if the acquisition target were a troubled or failing bank; this variation introduces new management and support capital at a critical time, serves to bolster public confidence and prevents FDIC and other regulators from initiating a forced sale.

d. *Advantages of the "BHC Only" Option.*

First, it liberalizes interstate bank expansion in a way which states can easily block via statutes restricting BHC acquisitions, provided those statutes do not discriminate between in-state and out-of-state BHCs. States retain power to determine their own preferred banking structure.

Second, BHC acquisitions can bring new management technology and capital to improve operations at the acquired bank. The option works to increase operating efficiency of the national banking system without the additional cost of *de novo* branching.

Third, permitting foreign BHCs under this option helps reduce the level of national concentration which would result if only U.S. BHCs were allowed to expand interstate.

Fourth, it gives management and shareholders of marginal banks a greater option to sell at a premium, rather than sell or merge under adverse conditions (*i.e.*, facing strong competitive pressure from out-of-state branches which entered the local market after repeal of McFadden.)

e. *Disadvantages of the "BHC Only" Option.*

First, it does not address the issue of branching and the McFadden Act. Unit banked states, or areas allowing only limited branching, would remain unchanged. The option brings none of the advantages associated with branching.

Second, it constrains interstate expansion to a single organizational form—BHC—which may not be appropriate, most cost efficient or otherwise fully desirable for each market.

Third, it encourages bank acquisitions. This option raises the likelihood more U.S. banks will become subsidiaries of foreign banks.

Fourth, the option does not guarantee all states will receive new out-of-state competition. States can much more easily prevent BHCs freed from the Douglas Amendment than national banks freed from the McFadden Act. State legislatures may pass (nondiscriminatory) laws restricing BHC acquisitions, and thus shelter their local banks from both foreign and U.S. BHCs. As a result, the bidding for banks in other states could become even more competitive. "BHC Only" does not necessarily lead to a nationwide banking system.

Fifth, BHC expansion into concentrated markets does not *guarantee* those markets will become less concentrated, unless the BHC has entered with the intention of stimulating operations and building a significantly larger market share. It is uncertain how effective foreign banks' management would be in revitalizing a marginal competitor in a local market.

Sixth, it may be argued this option works to increase concentration at national levels, bringing more U.S. banking resources under centralized BHC management.

f. *Conclusion: "BHC Only" Option.*

Any BHC acquisition requires consent of the Federal Reserve Board. Under the BHC Act, the target bank's primary supervisor (OCC or the state bank supervisor), as well as the Department of Justice, must first be notified by the FRB and given the opportunity to comment on the proposed acquisition. Therefore, regardless of how the Douglas Amendment is modified, regulatory bodies would still have the opportunity to oppose takeovers which worked against the public interest.

However, the difficulty with repealing just the Douglas Amendment is that it restricts intrastate and interstate bank expansion to a specific organizational form which is not necessarily most appropirate or efficient. Most important perhaps, the "BHC Only" option does not address the McFadden branching issue.

Expansion Within Limited Geographic Areas. This option comtemplates replacing some state boundaries with other definitions of boundaries—population, city lines, county lines, etc.—usually defined within an SMSA which straddles state lines.[1] It is assumed that all banking services could be offered within the liberalized SMSA by banks from contiguous states. Foreign banks would not add significantly to the total number of potential competitors seeking to enter the liberalized market area, unless competitors are redefined to allow *all* out-of-state banks, regardless of whether they come from contiguous states. The option is faulty insofar as it prevents branch expansion to structurally similar SMSAs which do *not* straddle state boundaries; hence aggressive foreign and U.S. banks could still argue that McFadden restrictions prevented expansion to growing SMSAs where consumers needed new banking offices.

a. *Advantages of the "National Market Area" Option.*

The difficulty of defining a "natural market area" is nevertheless an advantage in this option, because flexible (vague) definitions would permit bank regulators to proceed with caution, or accelerate liberalization as warranted.

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1. The kind of SMSA of special relevance would be a central city and its suburbs crossing state lines, in which economic and other inter-relationships exist to create a natural market area for all banking services.

Other advantages of the natural market area approach include its direct relation to retail market, and its gradualistic approach and experimental nature. Larger SMSAs are, almost without exception, the retail markets banks seek if they could expand interstate. Wholesale lending is already a nationwide market and expansion by natural market area (*e.g.*, SMSAs which straddle state lines) does not immediately put pressure on unit banks (in smaller towns or rural areas) which lie outside of the defined natural market area.

Because regulators must define natural market areas, the option lends itself to gradual liberalization, watching how out-of-state banks expand to the first experimentally-defined natural market areas,[1] and allowing regulators to prevent misuses of the expansion privilege by foreign or U.S. banks.

b. *Disadvantages of the "Natural Market Area" Option.*

Difficulties of the natural market area option are: (1) How should a natural market area be defined? According to population, per capita income, per number of retail businesses, per fixed relationships between all these variables, etc.? The regulator is open to criticism regardless of how the market area is defined. (2) The option can be quickly outmoded by technological change[2] or rapid economic growth; the definition of natural market area would have to remain flexible and open to frequent revision. The con-

1. *E.g.*, the proposed experiment to allow savings and loan associations to branch into Maryland and Virginia where those states join the Washington, D.C. SMSA.

2. For example, what is the natural market area for electronic funds transfer services? What is the natural market area for drawing cash from EFT terminals?

cept would evolve with banking and services themselves. (3) Natural market area for whom? For foreign banks, the only interstate "natural market" SMSA is the New York, N.Y.-New Jersey SMSA.

c. *Conclusions.*

In the absence of complete liberalization of geographic restrictions on branching and BHC acquisitions, the "natural market area" option addresses the principal issue of competition for consumer (retail) business with a potentially flexible tool, the definition of a natural market. If natural market areas are opened to *all* national banks, regardless of proximity to the market, then *the* McFadden principal issue is addressed by achieving national competition for consumer (retail) business. Foreign banks will increase competition among entrants to liberalize market areas, and raise the quality of service to gain consumer business.

Other variations include opening SMSAs regardless of whether they straddle state lines, and opening expansion to contiguous states. Interstate expansion to SMSAs (as defined, *i.e.*, of a minimum size such as above 2 million population) allows foreign (and U.S.) banks to go after the most important markets. The option protects small banks and unit banks outside SMSAs (as defined); foreign banks are treated equally with U.S. banks, but U.S. banks are treated unequally *inter pares* (not all face out-of-state competition). The suboption does not lead to full intrastate branching and is slightly less provocative on the issue of states' rights. Not all states are affected; some may have populations too dispersed to qualify for a "free branching SMSA".[1] The SMSA suboption focuses on the retail bank-

1. Such as the unit banking states of Montana, Nebraska, North Dakota, Wyoming.

ing sector and cuts to the heart of "deMcFaddenization" without raising broader questions to complete geographic liberalization.

Interstate expansion to contiguous states restricts most foreign bank expansion to:

Oregon		Wisconsin	Vermont
Nevada		Indiana	Massachusetts
California	Iowa	*Illinois*	*New York*
Arizona		Kentucky	Connecticut
		Missouri	Pennsylvania
			New Jersey

Foreign banks should only be allowed to expand in states contiguous to their home state, because U.S. banks have only one "home" state (California and New York would be the home states for most foreign banks.) Not all U.S. banking markets would receive foreign bank competition; the suboption does not maximize foreign banks' potential contribution to improve competition, raise efficiency, lower service costs, lower loan spreads, and increase user convenience. Contiguous states do not necessarily form natural market areas; state boundaries still serve as banking boundaries, although banking boundaries become more regional.

Of (1) natural market areas, (2) SMSAs nationwide (as defined), and (3) contiguous states, the second is most liberal because it offers foreign (and U.S.) banks more opportunities to expand interstate. Opening progressively smaller SMSAs gives regulators flexibility to test progressively liberal interstate expansion, and, of the three suboptions, maximizes foreign banks' potential contribution to competition and efficiency.

Appendix B to Chapter 8

Standard Metropolitan Statistical Areas That are in Two or More States: Population and Bank Deposits

Area	*Population (thousands)*[1]	*Commercial Bank Deposits (millions of dollars)*[2]
Allentown-Bethleham-Easton, Pa.-N.J.	628	3,012
Augusta, Ga.-S.C.	291	690
Binghamton, N.Y.-Pa.	311	867
Chattanooga, Tenn.-Ga.	406	1,248
Cincinnati, Ohio-Ky.-Ind.	1,371	4,039
Clarksville-Hopkinsville, Tenn.-Ky.	149	416
Columbus, Ga.-Ala.	231	528
Davenport-Rock Island-Moline, Iowa-Ill.	376	1,694
Duluth-Superior, Minn.-Wisc.	268	980
Evansville, Ind.-Ky.	286	1,310
Fall River, Mass.-R.I.	186	259
Fargo-Moorhead, N.D.-Minn.	133	677
Fort Smith, Ark.-Okla.	191	607
Grand Forks, N.D.-Minn.	106	226
Huntington, Ashland, WVa.-Ky.-Ohio	294	999
Johnson City-Kingsport-Bristol, Tenn.-Va.	413	1,102
Kansas City, Mo.-Kan.	1,292	6,184
Lawrence-Haverhill, Mass.-N.H.	274	667
Louisville, Ky.-Ind.	884	3,862
Lowell, Mass.-N.H.	233	310
Memphis, Tenn.-Ark.-Miss.	904	3,287
Minneapolis-St. Paul, Minn.-Wisc.	2,046	9,623
New London-Norwich, Conn.-R.I.	257	469
New York, N.Y.-N.J.	9,279	133,561
Norfolk-Virginia Beach-Portsmouth, Va.-N.C.	825	1,867

1. 1979 estimates, from Commercial Atlas and Marketing Guide (Chicago: Rand McNally & Co.) 1979.

2. June 30, 1978, from FDIC, Summary of Deposits in All Commercial and Mutual Savings Banks.

Area	*Population (thousands)*[1]	*Commercial Bank Deposits (millions of dollars)*[2]
Omaha, Neb.-Iowa	592	2,210
Parkersburg-Marietta, WVa.-Ohio	155	602
Philadelphia, Pa.-N.J.	4,800	19,305
Portland, Ore.-Wash.	1,155	4,409
Providence-Warwick-Pawtucket, R.I.-Mass.	898	3,841
St. Louis, Mo.-Ill.	2,381	10,260
Springfield-Chicopee-Holyoke, Mass.-Conn.	546	990
Steubenville-Weirton, Ohio-WVa.	162	557
Texarkana, Tex.-Texarkana, Ark.	120	404
Toledo, Ohio-Mich.	784	2,695
Washington, D.C.-Md.-Va.	3,061	10,867
Wheeling, WVa.-Ohio	181	717
Wilmington, Del.-N.J.-Md.	522	2,028

1. 1979 estimates from Commercial Atlas and Marketing Guide (Chicago: Rand McNally & Co.) 1979.

2. June 30, 1978, from FDIC, Summary of Deposits in All Commercial and Mutual Savings Banks.

APPENDIX U

Massachusetts House Committee on Banks and Banking Research Staff Summary (November 9, 1982) (Excerpt)

HOUSE 6724

NEW DRAFT OF SENATE 2011

An Act Relative to Branch Offices and Acquisitions of Financial Institutions

Senate 2011 seeks to establish in the General Laws the necessary authority for a regional, New England, banking system. Although this main thrust is clearly contained in the Senate-passed legislation, that bill failed to cover every option for implementing this authority. Additionally, language has been added to ensure that only New England based financial institutions can avail themselves of this authority.

In general, the new draft amends the following statutes:

- the foreign banking statutes
- the bank holding company law
- the electronic banking act
- the branch office law
- the statutes governing mergers and purchases
- certain mortgage lending statutes

The new draft is keyed to the recodified banking laws as set out in Chapter 155 of the Acts of 1982. It amends that Chapter 155 to clarify that its recodified provisions become effective on July 1, 1983. This clarification is made due to

recent passage of a banking reform act by Congress. The effective date section sets out the following time sequence:

- limitation of entry by foreign banks effective on passage
- holding company and electronic banking authority effective July 1, 1983
- branching, merger and purchase provisions become effective on July 1, 1983

Since the new draft amends the recodified laws certain technical corrections, if any, are made at this time.

A section-by-section analysis of the new draft follows:

(*Sections 1 and 2 amend the foreign banking laws*)

SECTION 1. The amendments to these statutes are necessary to restrict the present statute allowing any out-of-state banking corporation to do business in the Commonwealth if it obtains the necessary certificate and meets other statutory requirements.

Under the new draft this out-of-state entry is limited to New England financial institutions or banks from other countries. Additionally, provisions are added requiring that other regional state to grant similar authority to Massachusetts banks. Generally an out-of-state institution must operate in accordance with the laws governing our state-chartered banks.

The new draft retains the authority for any corporation to enter to perform only fiduciary duties.

This section would become effective upon passage and foreign corporations now operating in the state are grand-

fathered in. Certain antiquated sections of law are eliminated.

SECTION 2. This section amends the same sections as section 1 above as they appear in the new recodified banking law which becomes effective on July 1, 1983. Technically, it is necessary to make these changes in conjunction with section 1.

Section 2 will become effective on July 1, 1983.

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APPENDIX V

Testimony by Massachusetts Senator John A. Brennan Jr. Before Connecticut Legislature (March 3, 1983) (Excerpt)

SEN. SULLIVAN:

* * *

[S]o at this time now, I'd like to open the public portion of the meeting and we are honored to have with us today a member of the Legislature of the Commonwealth of Massachusetts, a man by the name of Senator John Brennan, who is the chairman of the Senate side of the banks committee and the legislature and who probably had more to do with bringing forth the regional bank bill in the State of Massachusetts than probably anybody in the entire legislature.

He has consented at my request and at the request of some of the members of the legislature here, to come down today and give us some insight as to how they came forth with the bill that they did come out with, which by the way, is the regional type bill. So at this time I would like to call on Senator Brennan to give us some of his views on it. And the next speaker will be Preston King.

SEN. BRENNAN: Thank you very much Mr. Chairman and members of the committee. It is a great privilege for me today, a country boy from up in Massachusetts to be in the great State of Connecticut especially to address the chamber. I welcome the opportunity to share with you some of our ideas and concepts that grew up and developed and evolved over the so called regional or New England Regional Experimental Banking Network, if you will, and basically to offer my comments in a conceptual way, Mr. Chairman and members of the committee, as opposed to

specifically commenting on the legislation that is before you, I wouldn't be that presumptious. But I do wholeheartedly recommend to you Mr. Chairman and members of the committee the adoption of a regional approach to interstate banking. It is similar to the approach that we have taken in Massachusetts. A brief overview of your legislation, and the specific legislation that you are considering today, it bears remarkable similarity to the Massachusetts bill, but it's a little bit narrower than our concept. But I think it would be a very very good companion to the Massachusetts concept that is also in place in the State of Maine. I think it has some very definite benefits for the banking institutions, both in your state and in the region, and also for the banking public here in the New England region. My reasons in support of that, Mr. Chairman and members of the committee, are as follows—I come at it from accepting a basic premise, it was first stated here today by the your banking commissioner, and that is that within a reasonably short period of time, that interstate banking on a national basis will be a reality, and if you accept that as a basic premise, my arguments in support of a regional concept flow quite nicely. Of course if you don't accept the basic premise that regional banking will be here on a national basis in a relatively short time, then the arguments will fall down. But I believe, as do most of the observers of the banking scene on a national basis, that interstate banking will be here on a national basis within a very short period of time.

Indeed, as far as non-banking financial institutions are concerned, we have interstate banking going on in every neighborhood and every city and town in your state and my state and every state in the [*sic*] rate today with the

money market accounts being offered by the various mutual funds and also that Merril Lynche's [*sic*] of the world and Sears Roebuck's just to name a couple. I think it is advisable for a region such as ours, a region that has a tradition of cooperativeness, a region that has a tradition of regional pride, Mr. Chairman, to get up and get going in terms of providing the banking institutions within this region whoever had a tradition and a concern for the stability and the vitality and the economic health of this region. Provide those entities with a testing ground for a freak period of time, so that they will have an opportunity to be in a healthier situation, they'll have an opportunity to accustom themselves, if you will, to the rigas [*sic*] of interstate banking, before they have to go head on head with the stiffer competition on a national basis. By the same token, as they, the institutions themselves are gearing up becoming accustomed to what is a radical departure from the traditional way of doing banking, that they'll have a sense, I believe, Mr. Chairman, it's my opinion, they'll have a sense and a commitment based on their tradition of service to the region of further providing banking services and servicing the credit needs of the consumers and small businesses within the New England region. There have been some concerns voiced in certain quarters about the constitutional aspects of such a proposal. I don't pretend to be a constitutional expert, but I have and along with my staff examined extensively the constitutional aspects of this proposal. I believe that a regional approach the banking rests on very very firm constitutional grounds. That based primarily on among other things, a review of the Douglas Amendment, which my interpretation of the Douglas Amendment McFadden Bank Act, specifically delegates, Mr. Chairman

and members of the committee, the right of states to engage in interstate banking to us, the state, the state legislators have that authority. And I think we exercise that authority prudently when we make that decision to go forward with interstate banking. And it's a prudent decision to approach it on a regionalized method of doing things for the following reasons that banking has traditionally been very, very protective in a sense for concern for the safety and soundness reasons primarily in that we have these artificial political barriers as I call them, the geographic barriers that have grown up, but banking has been accustomed to doing business in that manner.

If we are going to embark, as I believe we should, on a radical new way of doing banking nationally, that we should approach that in a measured reason manner in a regional approach is the way to go Mr. Chairman. Those are basically my thoughts on the issue. I'd be very, very happy to share with you any further research that we have done on the issue in Massachusetts and answer any questions that you Mr. Chairman or members of the committee may have.

APPENDIX W

Connecticut House Debate (May 26, 1983) (Excerpt)

REPRESENTATIVE ONORATO:

* * *

And if you want to talk about riding roughshod, if you want to talk about protecting the integrity of our own Connecticut home banks, what this bill does is gives Connecticut the lead time that it needs to go into the regional areas where they have something in common with the other members.

Give them a chance to grow and then they'll be in a position to compete.

* * *

What we're trying to do here is protect the integrity of our own system, of our own banking industry. And yes, in the long run the consumers will benefit from it when you have healthy competition, and there will be healthy competition.

Mr. Speaker, I have something that I read yesterday as a matter of fact that the White House may push for interstate banking next year. It stated May 24, which is two days ago. It shows you how close we are to interstate banking. If the Federal government proposes interstate banking on a national level, where does that leave the State of Connecticut? At whose mercy? How does that make the State of Connecticut stronger? How does it make its

institution stronger so that it can be able to compete, or do we want banks from other parts of this country to come in and call Connecticut their home and meanwhile we have no banks we can call ours.

That's what this bill is trying to accomplish. And it's setting up the lead time that we believe is necessary to accomplish this purpose. Yes, interstate banking will come, interstate banking will come on a national basis, and that's probably good.

But give our state and our institutions that are taking care of the people, that are taking care of the problems in in this state, give them a chance to compete and compete fairly. Don't let them go under the first bank that comes in. That's all this bill is trying to do. That's why Rhode Island passed theirs last week and the Governor signed it.

That's why Massachusetts has a law on its books, scheduled to go in effect July 1. That's why Maine has one, although given the location of Maine, with the ocean on one side and Canada on the other side, it was a smart move for them to go national.

But that's why these things are done. To protect what's theirs that's within their own state.

APPENDIX X

Connecticut Senate Debate (May 18, 1983) (Excerpt)

SENATOR SULLIVAN:

* * *

[I] want to commend the committee for the long, hard hours they put into listening to various testimony in regards to this and, Mr. President, the main reason for this New England position is that if we were to open the doors up a big bank, and I mentioned these various banks, a large bank with a hundred billion dollar asset [*sic*], could come into Connecticut and pick up two or three or four or five banks or four banks or three banks and then bring their entire marketing operation into Connecticut and a bank that size could overwhelm almost any bank we have here right now. So, Mr. President, we thought that to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking, which I have no doubt is going to come, when, I'm not sure about that, but I know in the future it will come, in order to give our banks in Connecticut time to merge and consolidate and purchase some of New England banks around and get as large as they possibly can so we can thwart any intervention as best we can from the large institutions and still provide the service, the loan power of the banks that we have in Connecticut today to our Connecticut consumers. As we know, many of the large New York banks have great, great investments in foreign countries and so there's a fear that they would come into Connecticut, get our deposits and invest them in foreign coun-

tries, so we've tried to the best of our ability to prevent this from happening and the result is the New England Bank, and, Mr. President, I would move adoption of this amendment and I hope it would be unanimous and I would ask for a roll call vote, Mr. President.

* * *

Mr. President, just to answer a few of the questions. I think Senator Santaniello pointed out that the Massachusetts law was much more favorable to Massachusetts than the Connecticut law would be and that they were getging the advantage. Well I have a letter from the Deputy Commissioner of Banking in Massachusetts, a Mr. Edward Flynn, Jr., who indicates to me that our law fairly well tracks their law so it's pretty compatable, the law is. As regards to Mr. Santaniello mentioning the big, large banking centers in Boston, when you take seventeen million dollars and you compare it to just one bank in New York of a hundred and twenty-three or a hundred and twenty-four million, that bank is (inaudible) too. What we're trying to do here is to get our New England financial institutions in a position where they can withstand the assault of the big money markets and in answer to Mr. Santaniello's question about some of our Fortune Five Hundred corporations going to New York now, that's one of the purposes of this bill here, so that we can get the New England banks merged together and bought together so that they can offer larger loans to these Fortune Five Hundred companies and compete with the big money centers in New York and get stronger and stronger for the eventual time when interstate banking comes, if that ever comes . . . .

APPENDIX Y

Resolution of the Caucus of New England State Legislatures

CAUCUS OF NEW ENGLAND STATE LEGISLATURES

Hon. John L. Martin, Chairman
Speaker of the Maine House

Carolyn Morwick, Director

Room 1301
250 Stuart Street
Boston, Mass. 02116
(617) 451-0263

Whereas the American financial system is undergoing a transformation due to present economic conditions, modern technology and the establishment of new financial entities; and

Whereas recent federal actions have accelerated this transformation of our financial system particularly as it relates to banking; and

Whereas these developments presage the institution of nationwide interstate banking through federal action; and

Whereas the banking public of New England has a direct and abiding interest in a strong, local, financial network to provide services; capitol and community economic security;

Therefore, be it resolved by the Caucus of New England State Legislatures that a Committee be established comprised of two legislators from each of the New England states, one appointed by the Speaker of the House and one appointed by the Senate President of each legislature for the purpose of pursuing the establishment of a regional banking system in order to strengthen the economic health and vitality of the region.

APPENDIX Z

Program Agenda for "A Conference on New England Regional Banking" (February 4-5, 1983)

The Caucus of New England State Legislatu es

in conjunction with

The New England Governors' Conference

The Council of State Governments
Eastern Regional Conference

and

The New England Congressional Caucus

presents

"A CONFERENCE ON
NEW ENGLAND REGIONAL BANKING"

An educational forum to expore the concept of a New England interstate banking system.

February 4-5, 1983

Boston Marriott Hotel/Long Wharf
Boston, Massachusetts

February 4, 1983

PROGRAM

Morning

9:30-11:30 REGISTRATION

Boston Marriott Hotel/Long Wharf

Those participating in the conference are requested to sign in.

11:45-1:00 LUNCHEON

Boston Marriott Hotel/Long Wharf

Welcome: Speaker John Martin, Maine
Chairman, Caucus of New England State Legislatures

Remarks: The Honorable
Michael S. Dukakis
Governor, Commonwealth of Massachusetts

Afternoon

1:30-4:00 PANEL DISCUSSION

Moderator: Speaker John Martin, Maine

Issues: A, B, C.

A: *"New England Regional Banking"*
Legislative Panel

Moderator, Senator John Brennan, Massachusetts

February 4, 1983

PROGRAM

B: *"Implications at the Federal Level"*

Speaker, Charlotte Staelin,
Executive Director
New England
Congressional Institute
Washington, DC

Speaker, Richard Syron,
Senior Vice President
Federal Reserve Bank,
Boston, Massachusetts

C: *"Implications at the State Level"*

Moderator, Commissioner
Gerald Mulligan,
Massachusetts
H. Donald DeMatteis,
Bank Superintendent,
Maine.
Commissioner
Brian Woolf,
Connecticut

(4:00-5:30 CHECK IN TIME FOR THOSE REGISTERED AT THE HOTEL)

February 4, 1983

PROGRAM

Evening

5:30-8:30	RECEPTION AND DINNER
5:30-6:30	Cocktails (Cash Bar)
6:30-8:30	Dinner
	Remarks: Senate President, William Bulger, Massachusetts

THERE WILL BE A SHUTTLE BUS AT THE MARRIOTT AT 5:15 TO TRANSPORT PEOPLE TO THE HARVARD CLUB. SEVERAL RUNS WILL BE MADE.

THE SHUTTLE BUS WILL ALSO BE AVAILABLE AT THE HARVARD CLUB TO TAKE PEOPLE BACK TO THE HOTEL.

February 5, 1983

PROGRAM

8:30-10:00 a.m.	BREAKFAST, SUMMATION
	Legislators, Regulators, Sponsors
10:00	ADJOURNMENT

Registered Participants

CONNECTICUT

Rep. Richard Balducci, Assistant Majority Leader
Rep. Julie Belaga, Assistant Minority Leader
Rep. William Candelori, Assistant Majority Leader
Senator William DiBella
Rep. Robert Gilligan, Assistant Majority Leader
Rep. John Groppo, Majority Leader
Rep. Kevin Johnston
Rep. Timothy Moynihan, Deputy Majority Leader
Rep. Alfred Onorato
Senator William Sullivan
Rep. John Woodcock

Stephen Gabriel, Legislative Commissioners Office

Robert Carrigher, Executive Assistant to Banking Commissioner
Commissioner Brian Woolf, Department of Banking

MASSACHUSETTS

Senator John Brennan
Rep. Ellen Canavan
Rep. Thomas Finneran
Rep. Andrew Rogers
Rep. Paul White
Rep. Philip Travis

Joseph Leonard, Senior Research Analyst, Committee on Banking
Joseph Martin, Administrative Assistant, Senator John Brennan
James McCormack, Senate Counsel, Committee on Banking

Paul Bulman, Acting Commissioner, Department of Banking
Edward Flynn, Department of Banking
Gerald Mulligan, Commissioner of Banking

William Gildea, Executive Director, New England Governors' Conference
Connie LaPointe, New England Governors' Conference

Stephen Leahy, New England Governors' Conference
George Sahady, New England Governors' Conference
Charles Tretter, New England Governors' Conference

Richard Syron, Senior Vice President, Federal Reserve Bank, Boston

John C. Hoy, President, New England Board of Higher Education

RHODE ISLAND

Rep. Roger Begin
Senator Guido Canulla
Senator George Lima, Deputy Majority Leader
Edward Blue, Commissioner of Banking

MAINE

Rep. Joseph Brannigan
Speaker John L. Martin
Rep. Patrick Paradis
Rep. Alfred Perkins
Senator Ronald Usher

VERMONT

Rep. Susan Auld, Majority Whip
Rep. Donald Marsh
Rep. Harold Weidman

Dennis Ellingson, Deputy Commissioner of Banking

NEW HAMPSHIRE

Rep. Roger Beliveau
Rep. Elizabeth Crory
Rep. Marshall French, Speaker Pro Tem
Rep. Paul LaMott

Gail Mullen, Office of the Speaker, John Tucker

A. Roland Roberge, Banking Commissioner

NEW YORK

Alan Sokolow, Executive Director, Council of State Governments Eastern Regional Conference

WASHINGTON, DC

Charlotte Staelin, Executive Director, New England Congressional Institute

Guests

Association of Bank Superintendents, Washington, DC
Bank of New England, MA
Boston University School of Law, Morin Center for Banking Studies, MA
Brockton Savings Bank, MA
Casco Northern Corporation, ME
Comptroller of the Currency, MA
Connecticut Bankers Association, CT
Connecticut Bank and Trust, CT
Connecticut National Bank, CT
Credit Union Association, Inc., MA
First National Bank of Boston, MA
Issues Management, Inc., MA
Interstate Cooperation Commission, RI
Maine National Bank, ME
Maine Bankers Association, ME
Massachusetts Bankers Association, MA
Massachusetts Urban Reinvestment Advisory Group, MA
Moseley, Hallgarten, MA
Mutual Savings Central Fund, Inc., MA
New Bedford Institute for Savings, MA
New Hampshire Association of Savings Banks, NH
New Hampshire Bankers Association
Rhode Island Bankers Association
Savings Bank Association of Connecticut, CT
Savings Bank Association of Massachusetts, MA
Shawmut Corporation, MA
Union National Bank, MA
Vermont Bankers Association, VT
Woonsocket Savings and Trust, RI
Worcester Savings Bank, MA

APPENDIX AA

New England Business (December 5, 1983)

THE NEW ENGLAND
BANKING FORUM

To most bankers, that joke is getting old—and maybe too serious. With deregulation of deposits, a wave of mergers and consolidations, intensified competition from non-banking companies with the *strangest* approaches . . . the banking business is red hot and getting hotter. It's more uncomfortable and challenging—fiercer and more *fun* —than any old-time banker could ever have imagined.

It really doesn't matter very much where you start—the economy, deregulation, interstate banking laws or regional banking laws—in the end a roomful of bankers will work their way around to the basic subject: Where will we be in a decade, and what will our business look like?

New England Business brought five of the leading commercial bankers of the region together this fall for a round-table discussion, with bank analyst Stanley T. Wells, a senior vice president of Keefe Bruyette & Woods Inc., acting as moderator. The bankers talked for two hours, with the proceedings tape-recorded.

What these bankers decided was, first, that of the approximately 14,400 commercial banks in the nation, only about 400 of them were in their league—operating primarily as commercial lenders and working with assets in excess of $500 million. (The average assets of these bankers was more than $3 billion, assuming the completion of mergers on the table, and in such company, such completions *are* assumed.) The second thing they made clear was that

none of them—not even Walter Connolly, who soon will be running the second largest banking company in New England, with assets in excess of $10 billion—would be even the slightest bit surprised to be working for Walter Wriston in a few years.... Through the long conversation, none ruled out the possibility of being acquired; several seemed to welcome the idea.

It's changing, fast.

But let them speak for themselves. The text of the conversations as presented here is edited and condensed, and taken out of sequence. We think it holds pretty straight to the meat of it.

THE PLAYERS: ———————————————————

Walter J. Connolly Jr.—chairman and chief executive officer of CBT Corp., holding company for the $5 billion Connecticut Bank & Trust Co. and soon to hold the same position with Bank of New England, into which CBT will be merged. Connolly's stockholders are temporarily a bit churlish, but his demeanor is that of a man who will, in a few moments, shake your hand and leave a $100 bill in your palm.

John P. LaWare—a Chemical Bank veteran who in 1980 joined Shawmut Corp. as the boss, now managing $5.5 billion in assets and now the second largest banking company in New England. A power in the Vault, the political nexus of Boston, and a canny player. He is made of oysters and guile.

James J. Preble—chairman and chief executive at First Connecticut Bancorp in Hartford, a fierce devotee of quality of earnings and one of the conspicuous non-players of the gotta-get-bigger game. Staying smaller, over the years Preble's nearly $1 billion bank has gotten richer, command-

ing a high multiple for a bank that many believe may—or may not—be one of the last to go. If it does, it will cost them.

Hilton E. Wick—the big man in Vermont, where he is chairman of Chittenden Corp., the state's largest commercial bank. Was the acquisition of Rutland Savings Bank last year a coup, or growth for its own sake? Is he painting the store to sell it? Hilton Wick likes full interstate banking legislation; if he's going to sell, he'd just as soon have a big auction. The Cheshire cat. They talked for two hours on the record, and nobody mentioned that Connolly's company owns 4.9% of Chittenden. (Wick later sold Bank of Boston a position convertible into 14% of Chittenden's equity.)

James E. Chandler Jr.—vice chairman at Indian Head Banks of Nashua, N.H., and, like Wick, a fierce supporter of full interstate bank legislation. Acts fully confident that he's going to win, too, and that if his stockholders will complain to him, it will be about the unfairness of capital gains taxes.

Stanley T. Wells—bank analyst and salesman *par excellence* and the most careful follower of the major banking scene in the region. A few days before the meeting, Indian Head Banks made private placements of new stock representing nearly 15% of its equity—all to other banking companies. Wells was the broker. If you want to buy a bank, look on his shelf.

Kenneth Hooker: Editor, goad.

Wells: The most common perception currently is that interstate banking is not only inevitable, but it is also just around the corner. Is this a valid opinion, and if so, how do you best prepare? Walter, your institution is involved

in one of the largest interstate banking consolidations in history. How do you compare the abilities to achieve economies of scale on an interstate basis, as opposed to the intrastate consolidations you've experienced in the past?

Connolly: Well, we're going to find out whether or not the economies are really there or not at some point, when our transaction with Bank of New England gets consummated. We haven't tried it, so it would be presumptuous to say that there are 16 tried and true ways to effect economies of scale by virtue of an interstate merger.

We've identified a number of things that we do to complement Bank of New England's activities, and a number of things that they do that complement our activities. But I wouldn't be honest if I didn't say that the jury is out.

Preble: I think there's no doubt that interstate banking is inevitable. I don't think you're going to see it as rapidly as others, perhaps, believe; it's a very controversial issue. As many bankers are as opposed to it as want it, and we're coming into an election year. I just can't see Congress tackling this tiger in 1984. So you can automatically shove it over to 1985. Congress is famous for ducking issues. We have six states in New England, and each one of the [interstate banking] laws is different. You're going to wind up with four that are looking for full interstate and two that are looking for restricted—Massachusetts and Connecticut.

Hooker: What happens if the courts don't wait for Congress? There is a lawsuit . . . .

Preble: Somebody's going to have to force Congress to take action. If you extended the logical nonsense, you're going to wind up with 50 different banking laws. Maybe when it gets fouled up enough, Congress will step up and do what they should have done a long time ago.

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APPENDIX BB

American Banker (December 15, 1982)

Counselor's Corner

ARE STATE LAWS PERMITTING INTERSTATE BANKING CONSTITUTIONAL?

By John D. Hawks Jr.

For those who believe as I do, that true interstate banking is more likely, at least in the short run, to come about through state action than through federal action, recent events reinforce that conviction. Congress appears to be as intransigent as ever on the subject. The states, by contrast, appear to be increasingly more willing to mitigate the harsh effects of the Douglas Amendment. As they do so, however, questions may be posed as to the validity of state laws intended to facilitate interstate acquisitions.

While the Depository Institutions Act of 1982—an 80-page encycyopedia of legislation—has been touted as the most far-reaching federal banking law in 50 years, it does virtually nothing to advance interstate banking. Indeed, at the one point at which the law even touches on the subject—in its exceedingly grudging provision for "extraordinary acquisitions" of failing banks—the new law dramatically evidences the hostility of Congress to interstate acquisitions.

It permits the Federal Deposit Insurance Corp. to arrange for an out-of-state takeover only where a bank with assets of $500 million or more is closed. Even then, the FDIC must afford the state bank supervisor in the failed

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John D. Hawks Jr. is a partner at Arnold & Porter, Washington. He is a former general counsel to the Federal Reserve Board.

bank's state an opportunity to object—even if the failed bank is a national bank. If such an objection is raised, the FDIC board must be unanimous in its approval of the transaction.

Once bids are received by the FDIC to take over the failed bank, the FDIC must, if the lowest bidder is an out-of-state institution, permit rebidding by any bidder whose original offer was within 15% or $15 million of the initial low bid.

Finally, in authorizing such "extraordinary" bank acquisitions the FDIC must give first priority to in-state bank acquirers and then must favor acquirers in adjoining states over those more remote—apparently on the premise that if the state is to be invaded by outsiders, it is better that the outsiders be neighbors.

States Ease Attitude

On the other hand, attitudes at the state level appear to be softening. In the recent past, both South Dakota and Delaware have permitted limited entry by out-of-state banking organizations—primarily those seeking a usury "haven." During 1982, New York, following Maine's lead of several years earlier, permitted acquisitions by out-of-state banking organizations whose home states afforded reciprocity. Also during 1982, Alaska permitted virtually unconditional entry by out-of-state organizations.

At this writing, several other states appear to be considering similar steps. A proposal for reciprocal entry seems to have some support in Kentucky, and Massachusetts appears about to enact a provision allowing entry from other New England states on a reciprocal basis.

As the states struggle to devise means of permitting some form of outside entry without opening the floodgates, interesting questions arise as to the constitutionality of conditional entry laws. If the states lift the Douglas-Amendment veil, to what extent may they discriminate among potential entrants and how onerous may they make the conditions of entry?

Carter Golembe—a brilliant economist and sage consultant who prudently conceals the fact that he has a law degree—believes that the states may not condition or limit entry in any way. While I disagree with Mr. Golembe, there are, I believe, some consitutional limits that must be reckoned with.

Constitutional Bars

The two most familiar federal constitutional constraints on state action, of course, are the Commerce Clause and the Equal Protection Clause. The former grants to Congress the power to regulate commerce among the several states and has been construed as a limit on the power of the states to enact burdens on interstate commerce. The latter prohibits the states from denying to any person within their jurisdiction the equal protection of the laws.

But for the Douglas Amendment—which, in practical effect, bars interstate acquisitions of banks by bank holding companies unless the target bank's state explicitly permits such acquisitions—state laws purporting to restrict in-state bank acquisitions by out-of-state banking organizations would almost certainly be held invalid under the Commerce Clause. Indeed, in Lewis v. BT Investment Managers Inc., 447 U.S. 27 (1980), the Supreme Court held that the Commerce Clause invalidated a Florida law intended to ban

out-of-state bank holding companies from operating investment advisory subsidiaries in Florida.

The court pointed out that the Douglas Amendment did not authorize the states to limit the nonbanking activities of bank holding companies; it merely granted authority to the states to create exceptions to the general federal prohibition against interstate bank acquisitions.

Since Congress has clear constitutional authority to regulate interstate commerce, the "burden" on interstate commerce that results where a state elects not to enact a law lifting the Douglas-Amendment bar, plainly presents no Commerce-Clause issue.

But what is the limit of state authority where a state does elect to relax the Douglas-Amendment bar? Is the Douglas Amendment properly read as an all-or-nothing law—that is, is the state's choice simply either to allow entry unconditionally or to allow the Douglas-Amendment prohibition to remain in full force? Or may the states permit entry on a limited or conditional basis?

Delaware Limits

The implicit assumption underlying most of the state "Douglas Amendment" laws enacted to date is that limitation and conditions are permissible.

The Delaware law, for example, limits entry to the acquisition of a single newly established bank, having initial capital of at least $10 million, no more than one office, and at least 100 employees.

In addition, the acquired bank must be operated in a manner and at a location such that it will not be likely to attract customers from the general public to the substantial detriment of existing Delaware banks.

South Dakota's law has comparable limitations similarly intended to assure that newly established bank subsidiaries of out-of-state bank holding companies will only be operated as usury havens.

By contrast, the Alaska law, which otherwise permits virtually unrestricted entry, prohibits acquisitions of de novo banks or banks that have not been in operation for at least three years. This condition, which has its counterpart in many state laws regulating the in-state expansion of bank holding companies, is presumably intended to preserve the value of existing franchises by requiring out-of-state entrants to deal with the owners of banks in operation, rather than sponsoring their own entry vehicles.

Whether such restrictions are valid would seem to depend—at least so far as the Commerce Clause is concerned—upon the intent of Congress in enacting the Douglas Amendment. Many cases have held that Congress may authorize the states to restrict interstate commerce in a way that would be unconstitutional absent a congressional sanction. In the Lewis case itself the Supreme Court noted that "Congress, if it chooses, may exercise [the power to regulate the flow of interstate commerce] indirectly by conferring upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."

What did Congress intend? The Douglas Amendment is silent on the question of whether state laws permitting limited or conditional entry would be permitted. In the Lewis case, the Supreme Court used some very broad language that could be viewed as relevant in this regard.

It expressed doubt that the Douglas Amendment "authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes

a general federal prohibition on the acquisition or expantion of banking subsidiaries across state lines. The only authority granted to the states is the authority to create exceptions to this general prohibition, that is, to permit expansion of banking across state lines where it otherwise would be federally prohibited."

While this language could be construed to reflect a view that only unconditional entry is permitted, I believe it was not intended to be so broad. In the context of the issue being discussed by the court—namely, whether a state may restrict the non-bank activities of an out-of-state bank holding company—the court was simply rejecting the argument that the Douglas Amendment confers authority upon the states to impose such restrictions. It was not presented with the issue—and therefore had no need to address the issue—of whether the Douglas Amendment permits the imposition of conditions on acquisitions of the banks.

Unlike the statute itself, Sen. Paul Douglas was not silent on the issue. In explaining his amendment on the floor of the Senate, he stated that its purpose was to "permit out-of-state holding companies to acquire banks in other states only to the degree that state laws expressivly permit them." He thus seems to have assumed that the states might vary in the degree to which they would permit out-of-state bank holding companies to enter.

Congress certainly must have anticipated that the states would be concerned about the impact of such entry on local banks and on the local banking structure. Indeed, protection of this state interest was a moving force behind the Douglas Amendment.

Since Congress was willing to allow the states to bar entry of out-of-state banks entirely, by simply failing to

enact legislation permitting entry, it hardly seems that Congress would have intended to preclude the states from permitting entry—which, after all, tends to promote interstate commerce—in a manner that would nevertheless be reasonably protective of in-state banks.

If Congress did not intend to preclude the states from relaxing the Douglas-Amendment bar in a partial or conditional manner, as seems likely, then it is difficult to see why such limits or conditions should be viewed as inconsistent with the Commerce Clause.

This is not to say, of course, that limiting conditions may not run afoul of other constitutional restraints. It is entirely conceivable, for example, that a state might adopt entry conditions that were so unreasonably discriminatory as to violate the Equal Protection Clause.

In fact, an Equal-Protection-Clause challenge was mounted against Iowa's 1972 Douglas Amendment law, which permitted out-of-state bank holding companies to acquire banks in Iowa only if the acquiring company owned at least two banks in Iowa prior to the enactment of the law. Only one out-of-state company qualified under the Iowa law, and when that company was granted approval for an Iowa acquisition by the Federal Reserve Board, the Iowa law was challenged as a denial of equal protection.

The reviewing court rejected the challenge, however, stating that it was "perfectly rational" for the Iowa legislature to determine that the sole beneficiary of the law "has proven itself to be a positive force" in Iowa banking so as to allow it to compete in Iowa on the same basis as other Iowa banks, and that "the state would not be well-served if out-of-state bank holding companies were allowed wholesale entry into the Iowa market." Iowa Independent

Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1294 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975). The court thus sustained the power of the states to be reasonably selective in permitting entry by out-of-state holding companies.

Limits of Selectivity

But what are the limits of selectivity? Could a state limit entry by conditions relating to the size of the acquiring bank, for example? Is it "rational" for a state to select among out-of-state entrants solely on the basis of whether the prospective entrant's home state permits reciprocal entry?

Certainly the concept of reciprocity carries with it some basic sense of fairness. But the connection between a state's interest in regulating banking within its borders and its interest in securing reciprocal entry rights for its own holding companies in other states is not entirely clear.

Reciprocity becomes even more questionable as a basis for distinguishing among out-of-state entrants when further limitations, such as those now being considered in Massachusetts, are imposed, where the effect of the limitations is to preclude many states from eligibility for reciprocity. What is the constitutional rationale for limiting entry only to those holding companies from other New England states that permit reciprocal entry? A shared taste for milky clam chowder may not be sufficient to warrant discrimination against those favoring the tomato-based variety.

Quite apart from issues that may be raised under the Equal Protection Clause, discriminatory reciprocity pro-

visions conceivably could give rise to questions under a more obscure provision of the Constitution—the Compact Clause. Article I, section 10 of the Constitution provides that "no state shall, without the Consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power. . . ."

This clause, which was carried over from the Articles of Confederation, has its roots deep in colonial history, reflecting the requirement that the approval of the king be obtained, as a matter of crown prerogative, for the final resolution of boundary disputes between colonies. The draftsmen of the Articles of Confederation, concerned that the authority of the confederacy not be eroded by interstate agreements, required the consent of Congress for interstate agreements.

The Supreme Court has made clear that the Compact Clause was not intended to reach every possible interstate agreement, and it has upheld a variety of interstate agreements effected through reciprocal legislation. Nevertheless, the court has said that interstate agreements effected through reciprocal legislation could present concerns of a sort that the Compact Clause was intended to reach. It is possible that if two states—or a group of states, such as those in New England—enacted reciprocal legislation tailored to permit mutual entry by one another's banks—and no others—such action could be considered as giving rise to a compact requiring the consent of Congress.

Encroachment on Federal Prerogative

The Supreme Court has said on a number of occasions that the intent of the Compact Clause was to reach those interstate agreements that would have a tendency to in-

crease the political power of the states in a way that would encroach upon the prerogatives or supremacy of the federal government. How, it may be asked, would this test apply to limited reciprocal legislation such as that being considered in Massachusetts?

On the one hand, it could be argued that since Congress decided in the Douglas Amendment to leave to the states the decision whether to permit interstate bank acquisitions by bank holding companies, no federal interests are impaired and federal supremacy is not threatened when two or more states jointly undertake to exercise the authority granted to them by Congress.

On the other hand, the creation by the New England states of a six-state banking zone within which interstate expansion is permitted by agreement of the participating jurisdictions, and from which outsiders are excluded, may be seen as giving rise to a type of political confederation that is inconsistent with federal supremacy.

In one old Supreme Court case involving the Compact Clause, the court, quoting Story's "Commentaries on the Constitution," indicated that the consent of Congress may properly be required for interstate "treaties of confederation in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty . . ." Virginia v. Tennessee, 148 U.S. 503, 519 (1893). "Balkanization" of banking through narrowly limited reciprocal-entry legislation could be seen as presenting such concerns.

Consideration of the Compact-Clause issue prompts the question of why the New England states do not in fact form a compact and seek approval from Congress. If there is a legitimate regional interest in permitting New

England banks to expand within New England without regard to state boundaries, formation of an interstate compact agency to regulate expansion might be an effective means of promoting that interest.

It is even conceivable that the federal government might become a party to such a compact, as it did, for example, in the case of the compact establishing the Delaware River Basin Commission. Such a federal-state compact could provide an efficient means for coalescing national, regional, and local interests in bank expansion—and eliminating any legal doubts at the same time.

APPENDIX CC

Maine Sunday Telegram (March 13, 1983)

NEW ENGLAND PREPARES FOR REGIONAL BANKING

By Rebecca Morris
The Stamford Advocate

Boston—Within two or three years, the First National Bank of Boston could be dealing out loans and cashing checks in Waterbury, Conn., while Connecticut Bank and Trust does the same in Providence R.I.

The six New England states are about to embark on a regional banking experiment that would allow bank holding companies in one New England state to buy banks in any of the other states.

Federal law prohibits such boundary-crossing unless the states permit it, and most of the region's top banks are pushing the state legislatures to bring down the geographical barriers.

They reason that national interstate banking is coming soon anyway, raising the prospect of competition from the giant New York City banks. A limited experiment on the New England banks' home turf would allow them to grow and consolidate forces before trying to survive against New York banks, some of which have more assets individually than all of the New England banks combined.

(Another installment in the process of change toward regional banking in Maine occurred last week when the Casco Northern Corp., Maine's largest bank holding company, announced that it had agreed in principle to become part of the First National Boston Corp. Under the agree-

ment Casco would become an affiliate of First National Boston, with the Massachusetts company holding 25 percent of Casco's stock.)

(Other bank takeovers in Maine currently under way involve New York banks. Norstar Corp. of Albany is to assume control of Northeast Bankshare Association of Portland and Key Banks of Albany is taking over Depositors Corp. of Augusta.)

The regional experiment is an idea that some observers think will be duplicated in other culturally homogeneous regions. And it is likely, they say, that New England's experience will play a major role in determining how and when interstate banking is expanded nationwide.

Meeting in Boston earlier this month with bank officials and regulators, the Caucus of New England State Legislatures encouraged the states to act quickly by endorsing a regional banking system. If the individual legislatures approve, industry officials say, the likely result will be more concentration of financial assets among the region's largest bank holding companies, and a wider range of services for customers, especially in smaller communities.

There are about 14,000 commercial banks and about 42,000 financial institutions nationwide that accept deposits. Industry officials say that number will be greatly reduced during the next decade, in part because of interstate acquisitions.

In other ways, however, the changes may not be as dramatic as they sound. Most banking services—except retail deposits—already move across state lines.

Many states allow out-of-state banks to compete with home-town-banks by establishing loan offices. New York's Citicorp, for example, has such an office in Westport, Conn.,

and Manufacturer's Hanover has one in Norwalk, Conn. And bank officials argue that computer technology, which has generated nationwide automatic teller networks, is making geographical barriers meaningless.

For those reasons, said Brian Woolf, Connecticut's banking commissioner, national interstate banking is inevitable. But regional banking "may be the intermediate step so as to give our institutions time to develop strategies for competing in the interstate market and helping to shape their own destinies."

Two New England states already allow reciprocal banking arrangements across state lines. In December, Massachusetts passed a law inviting bank holding companies in the other five New England states to acquire its banks if those states grant Massachusetts companies the same right. Maine has had a similar law since 1975, although it allows banks to come from any state.

Connecticut's Interstate Banking Commission endorsed a regional system—specifically excluding the New York banks—on Jan. 5, and a bill to accomplish that is now pending in the state Legislature. Similar bills are being considered in Rhode Island, New Hampshire and Vermont. Outside New England, Alaska, Delaware, Iowa, New York and North Dakota already allow some form of interstate banking.

Several New England banks, expecting the legislatures to approve the regional system, have already positioned themselves to take advantage of the change by acquiring a 4.9 percent voting interest in out-of-state banks, the maximum allowed under current law.

The only organized challenge to the regional banking proposal is coming from the New York City banks, which

are anxious to move across the Connecticut border into the lucrative Fairfield County market, where hundreds of large companies have their headquarters and thousands of their wealthy employees live.

Harold Read, a Hartford, Conn., attorney who represents Citicorp, said the New York banks are likely to challenge the constitutionality of limiting interstate banking to certain states. Read said they will argue that under federal law, states may decide to invite out-of-state bank holding companies into their territory, but may not limit the invitation to certain states. Such a limit would interfere with interstate commerce—a province of federal government.

The New York banks' challenge poses other questions. There are two axioms in the industry about interstate banking. One is that any bank, large or small, will survive if it is well-managed, aggressive, and serves its customers well. The other is that removing state barriers will increase competition, resulting in better-packaged products, lower prices and better service to the consumer.

If all this competition is so healthy, why keep the New York City banks out, as Massachusetts has done?

"It's obvious why they did it," said Roger Castonguay, president of Northeast Bankshares in Maine. "They did it because if it were open on a nationwide basis, they're afraid they'd get gobbled up by the New York banks."

APPENDIX DD

The New York Times (April 3, 1983)

Brouhaha in Yankee Banking
Enlivening Banking for Fun and Fireworks

"Who," the New York banker inquired ever so politely, "is that man Brennan?"

A lot of bankers are asking that question nowadays because Massachusetts State Senator John A. Brennan Jr. is the author of the New England interstate banking plan.

To hear the 38-year-old Mr. Brennan tell it, he is a lawyer from a poor family in the suburban-Boston city of Malden and he never really cared very much about banking. So little did he care, he says, that he got downright bored after he was named chairman of the state's Senate Banking Committee. So, he simply looked around for a few nice issues to liven things up.

Two years ago he shepherded a bill through the Massachusetts Legislature that allowed state thrift institutions to offer many of the same services as do the state's commercial banks. Then things began to get boring again.

That is, until he read some reports about interstate banking. "Why not," he recalls asking himself, "start up a regional banking system right here in New England? I mean, history shows there are six states only by accident and there really should have been one big state." One thing Mr. Brennan, a Democrat, had not bothered to do at the beginning of his latest effort to overcome his boredom was to ask Massachusetts bankers what they thought of the idea.

"Honestly, I didn't," he says. "I just didn't think it would be good for the state if the big money center banks came in here. Our banks need the space to grow first." He also talks vaguely about jobs and the possibility of outside banks acquiring New England banks and consolidating clerical operations elsewhere, regional protectionism in its many forms.

To be sure, the Massachusetts bankers were not idle for long. It was they who inserted the anti-leap-frog clause, which prevents an outside bank from acquiring a bank in, say, Maine and using it to get into the rest of the Bay State. After prodding the interstate banking bill through the Massachusetts Legislature in December, the ambitious Mr. Brennan set up a conference in Boston of key legislators and bankers from all over New England. There, he told them why they should join the Massachusetts plan and set up a real New England system.

Since then, he has testified at hearings on interstate legislation in Connecticut and Rhode Island and is doing his share to get the Massachusetts-like bills passed there.

"This has been a real challenge," he says, leaving open the question of what he plans to do after that work is done and he gets bored again.

APPENDIX EE

Press Release (April 6, 1983)

TSONGAS AND FRANK INTRODUCE NEW ENGLAND INTERSTATE BANKING ACT

Senator Paul E. Tsongas (D-Mass.) and Congressman Barney Frank (D-Mass.) today announced the introduction of the New England Interstate Banking Act of 1983. The legislation is designed to authorize interstate banking activities between six New England states.

The purpose of this legislation, according to Tsongas and Frank, is to follow up on laws passed last year in Massachusetts, and earlier in Maine, which allow interstate banking in New England among states which choose to enact reciprocal legislation. It would give explicit federal acknowledgement to these state laws, or to similar interstate banking laws which are now being considered in several other New England states.

"It is important to note that this bill respects the decision making authority of the states," the Massachusetts lawmakers explained. "It only authorizes in federal law the activities which are specifically allowed by the laws of the states involved. A state could not be forced to accept interstate banking—it would have to act affirmatively in order for this legislation to have any effect within its borders."

The bill permits banks, savings banks, and savings and loan associations whose main offices are located in a New England state to establish branches in other states within the region where state laws allow. It would direct the Federal Reserve Board to give effect to state laws permit-

ting acquisitions across state lines in New England by bank holding companies. It gives similar direction to the other federal regulators in reviewing merger transactions involving banks, thrifts or holding companies within New England. The measure would expire in five years unless extended by Congress.

"States in New England are recognizing the need to remove geographical barriers in order to give financial institutions the ability to compete effectively in today's rapidly changing markets," Tsongas and Frank said. "But the consumer will be the ultimate beneficiary as new products and services can be offered more widely."

"We understand," they concluded, "that there is concern about the possible effects of national banking. That is why this legislation is drawn to encompass only the New England states where there is a regional and community identity. We believe this is a fair and balanced approach to this question."

Both stated that they would expect banks to be sensitive to local needs and would use their offices to ensure that larger banking units would maintain that sensitivity.

Frank is a member of the House Committee on Banking, Finance and Urban Affairs. Tsongas has been a frequent proponent of bank reform legislation. The New England states include Massachusetts, Rhode Island, Maine, Connecticut, New Hampshire and Vermont.

APPENDIX FF

United Press International Report (October 27, 1983)

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

DATELINE: BOSTON

The biggest interstate banking merger in New England history—between Bank of New England and CBT Corp. of Hartford—was approved by Paul E. Bulman, the Massachusetts banking commissioner.

The merger, announced late Tuesday, creates the second-largest bank holding company in New England, after Bank of Boston.

While the Connecticut bank commissioner has accepted the merger, it must be approved by the Federal Reserve Board in Washington.

Officials at both Bank of New England and CBT Corp. said an objection to the merger filed by Citicorp of New York would not hinder the deal.

The Smaller Business Association of New England, during a September public hearing, feared interstate bank mergers might limit credit available to small business.

But Bulman said the merger would not cause a "deleterious increase in the concentration of commercial banking resources either in Massachusetts or New England."

APPENDIX GG

Federal Reserve Press Release (August 20, 1984)

For immediate release

The Federal Reserve Board today announced its approval of the application of Bank of Boston Corporation, Boston, Massachusetts, to acquire the successor by merger to RIHT Financial Corporation, Providence, Rhode Island, and thereby indirectly to acquire Rhode Island Hospital Trust National Bank and Columbus National Bank of Rhode Island, both located in Providence, Rhode Island.

APPENDIX HH

Brief of the Board of Governors of the Federal Reserve System to the United States Court of Appeals for the Second Circuit (May 4, 1984) (Excerpt)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84-4047

NORTHEAST BANCORP, INC. et al.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

Nos. 84-5051 and 84-5053

CITICORP,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition for Review of Orders of The Board of Governors of the Federal Reserve System

BRIEF OF RESPONDENT

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In accordance with the directives of the courts that the role of the agency is to provide its guidance[10] or its views[11] to assist the courts in resolving constitutional issues, the Board has set forth in its Orders and the Appendix to those Orders, detailed findings on the constitutional issues. As the Board concludes, the evidence is not so clear and unequivocal as to justify a denial of the subject applications by the Board on the basis that the state statutes authorizing the transactions are invalid. While the Board has initially considered the constitutional questions raised by the Connecticut and Massachusetts statutes, it is ultimately for the courts to decide such issues. See *Plano* v. *Baker,* 504 F.2d at 599; *Finnerty* v. *Cowen,* 508 F.2d 979 (2d Cir. 1974).

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10. *Plano* v. *Baker,* 504 F.2d 595, 599 (2d Cir. 1974).

11. *Robinson* v. *U.S.,* 718 F.2d 336, 338 (10th Cir. 1983).

APPENDIX II

Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System (March 27, 1984) (Excerpt)

Statement by

Paul A. Volcker

Chairman,

Board of Governors of the Federal Reserve System

before the

Committee on Banking, Housing and Urban Affairs

United States Senate

March 27, 1984

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Before my concluding remarks, I would like to comment specifically on the provisions contained in Title X on regional interstate banking.

Title X provides specific authority, for a five-year period, for states to authorize regional interstate banking acquisitions. Such legislation would presumably resolve the question of the constitutionality of regional arrangements that have been authorized in New England and have been proposed in a number of other areas of the country. Yesterday, the Board approved two bank holding company mergers under the reciprocal arrangements of Massachusetts and Connecticut. Although there is a strong argu-

ment that these state laws are not consistent with the prohibitions against discriminatory burdens on interstate commerce established by the Commerce Clause of the Constitution, there is an absence of clear and unequivocal evidence to that effect. Consequently, the Board proceeded on the assumption of constitutionality and applied the criteria of the Bank Holding Company Act. But plainly, the differing constitutional interpretations raised by parties to merger applications demonstrates the need for Congressional action to clarify this issue at this time.

We believe this is all the more important because of our concern about the permanent establishment of regional banking areas. If Congress should decide to endorse regional arrangements, in our view it would be desirable to limit them to a transitional period. We would also urge you to consider the interstate banking question more broadly at an early date, once the powers issues are settled.

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APPENDIX JJ

Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System (April 4, 1984) (Excerpt)

Statement by

Paul A. Volcker

Chairman,

Board of Governors of the Federal Reserve System

before the

Subcommittee on Telecommunications,

Consumer Protection and Finance

of the

Committee on Energy and Commerce

United States House of Representatives

April 4, 1984

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Interstate Banking

The geographic scope of depository institutions has long been a key question of federal-state relations. The proliferation of nonbank affiliates of bank holding companies operating across state lines, loan production and "Edge Act" offices, integrated national markets for money and credit at the wholesale level, the current action of some

states themselves to permit entry of out-of-state banking organizations, and the broadened power of thrift institutions able to operate interstate have by now led to interstate banking de facto for many banking services. But, as a general matter, we have still prohibited on an interstate basis the provision of an integrated range of services in a single office, and we force particular activities into "unnatural," and less efficient, channels. Even in the consumer area, restrictions are rapidly breaking down. Recently, we were compelled by existing law to approve the acquisition of a Florida "nonbank bank," designed to engage in a full range of deposit-taking and consumer lending, by an out-of-state bank. We simply, under the provisions of the Bank Holding Company Act, felt we had no alternative.

We sorely need a fresh Congressional review of our entire policy toward interstate banking. While most of the issues in this controversial area will need to be held over to a later Congress, the present movement toward regional interstate banking arrangements does need to be dealt with now. Just last week the Board approved two bank holding company mergers under the reciprocal arrangements of Massachusetts and Connecticut, even though there are serious questions both about the constitutionality of such arrangements and their implications for public policy. If Congress wishes to support these regional arrangements, appropriately limited to a transitional period, legislation explicitly authorizing that approach should be enacted.

Conclusion

The legislative framework governing the banking system is sorely in need of change—change that can take account of the vast changes in the environment for the con-

duct of banking and our future needs. After long discussion and debate, the time is ripe for action. I believe there is a wide area of "conceptual" consensus, and agreement on a critical "core" of legislation—on the definition of a bank and a qualified thrift and on regulatory simplification—is clearly within grasp. The remaining issues surrounding the particular powers of a bank holding company are inevitably more controversial, but nonetheless ready for decision. We should not confuse lack of agreement among affected industry interests with absence of necessary information and argumentation. Workable approaches responsive to the various concerns elicited by months of debate and study can be developed in this legislative session.

APPENDIX KK

Remarks by Emmett J. Rice, Member, Board of Governors of the Federal Reserve System (June 21, 1984) (Excerpt)

PROGRESS TOWARD INTERSTATE BANKING

Remarks by

Emmett J. Rice

Member, Board of Governors of the Federal Reserve System

before

The National Association of Urban Bankers

New York City

June 21, 1984

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Finally, we come to the issue of regional interstate banking based on state action. Chariman Volcker expressed the Board's concerns over this route to interstate banking in his congressional testimony on September 13, 1983. At that time, he expressed the view that regional banking would be a new form of Balkanization of the banking industry. Inconsistencies are already developing as states select their regional partners. For example, the Georgia law would allow entry by Kentucky banks, but the

Kentucky law only allows entry by banks in states immediately adjacent to Kentucky.

Second, the regional laws clearly discriminate against those states that are headquarters for the nation's largest banking organizations. None of the proposed regional zones would include New York. Utah's law allows reciprocal entry from Hawaii and all the Western states except California. Not surprisingly, the constitutionality of these laws is being challenged, and Board approvals of applications under the regional laws are being stayed pending court decisions. Constitutional issues include the need for congressional ratification of interstate compacts, the creation of new barriers to interstate commerce, and the issue of equal treatment under the law. Various bills in the Congress would attempt to remove the constitutional uncertainty surrounding these state laws, and ultimately the Congress and the courts will have to resolve these questions.

Two principles are involved in this conflict. First, we have the right of a state to determine its own banking structure, as provided by the McFadden Act and the Bank Holding Company Act. Second, there is the issue of the effect of one state's actions on the other states. Once a state exercises its option under the Bank Holding Company Act to allow entry by out-of-state firms, can it then discriminate among the states? Or, must allowing out-of-state entry be an all states or no states proposition? These are difficult questions and their resolution by the courts may produce landmark decisions on states' rights and the national interest.

In addition to the objections raised by Chairman Volcker, I have problems with the concepts underlying the rush to pass regional interstate banking laws. These laws

are clearly designed to permit mergers among the largest banks within each region. Thus far, the bulk of the interstate activity has consisted of the acquisition of relatively large firms by even larger firms. Because the merging banks did not compete in the same geographic markets, the antitrust laws did not prevent their merger.

There has been no demonstration of any public benefits from regional interstate banking. The proponents claim that regional banking will lead to faster regional economic growth, but there is no evidence that there is any relationship between banking structure and economic development. They claim that the merging banks will achieve economies of scale, but there is no evidence to support that opinion. They claim that by growing larger they will be in a better position to survive the eventual entry of the nation's largest banks. However, there is no evidence that the regional banks need to be larger to survive. Survival is the result of providing good service at competitive prices and there is no evidence to suggest that this is directly related to the size of the organization. The advocates claim that larger banks can better serve the needs of large businesses, but there is no evidence that the credit needs of large business firms are not being met. In summary, there is no evidence to support the claims of the proponents of regional banking.

Regional bank mergers would have some negative impact on the aggregate concentration of banking resources in the nation. Many of the banks that would be involved in these mergers are among the largest banks in the country. In addition, if large regional organizations are formed now, and full interstate banking is allowed in a few years, the potential acquisition of the regional organizations by

the national firms would lead to an even further concentration of banking resources.

Thus, while regional interstate banking does serve as a means of transition from state limitations on geographic expansion to full interstate banking, I think the transition period should be very short. The enactment of a national law with controls on large bank mergers would provide uniform expansion rules before intraregional large bank mergers set the stage for the increased concentration of banking resources.

To conclude my comments, let me again stress the important points. First, interstate banking is probably inevitable given the developments of the past few years. Second, while the arguments in its favor are not very strong, there is some potential for social gain. Third, the transition should take place on a level playing field under rules that do not disadvantage banks relative to their nonbank competitors. Fourth, the rules for interstate banking should be established by the Congress. Loopholes in the laws, such as those that allow nonbank banks, should not be the basis on which interstate banking develops. Finally, any system of interstate banking should contain effective constraints against mergers and acquisitions that would increase the concentration of banking resources and leave the nation's financial system dominated by a handful of giant nationwide banking organizations.

APPENDIX LL

Statement of C. T. Conover, Comptroller of the Currency (March 21, 1984) (Excerpt)

STATEMENT OF

C. T. CONOVER
COMPTROLLER OF THE CURRENCY

Before the

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

UNITED STATES SENATE

March 21, 1984

* * *

Title X—Interstate Banking

This title would authorize states to adopt interstate banking and branching standards subject to reciprocity or regional or other geographical limitations. The interstate authorizations would be temporary, expiring after five years, unless the required Presidential report to Congress would recommend otherwise.

In the past, we have consistently supported geographic deregulation of banking. Such deregulation, coupled with relaxed product powers, will significantly enhance competition in the financial marketplace. The direct benefits of increased competition among financial services institutions will be a wider range of consumer choice and a climate conducive to industry innovation.

In addition to Title X, several other bills have been introduced which also propose geographic deregulation:

- Title X is an expanded version of Sen. Tsongas' "New England Interstate Banking Act of 1983" (S. 1002) which would authorize regional or reciprocal arrangements by the New England states only.
- Sen. Mattingly's "Interstate Banking Act of 1983" (S. 2113) is also an expanded version of S. 1002. It would permanently permit any state to authorize interstate banking. Although the bill in its operational provisions does not explicitly refer to reciprocity or regional conditions, it recognizes, in general terms, that legislation including a reciprocal or regional limitation would be considered to be enacted pursuant to the power of Congress to promote interstate commerce.
- Sen. D' Amato's "Banking Geographic Deregulation Act of 1983" (S. 2107) would repeal the Douglas Amendment after five years. During the five-year phase-in period, it would allow bank holding companies to establish or acquire, each year, one bank in two states. This bill would affect bank holding companies only.

While we would prefer more extensive geographic deregulation, we also welcome any—even partial—relaxation of the current restrictions. For instance, authorizing reciprocal or regional expansion may be a reasonable first step in the direction of nationwide interstate banking.

Title X amends the current Bank Merger Act to authorize interstate mergers of banks to involve a bank from another state if such mergers are explicitly authorized by the statute of the other state. However, Title X fails—by apparent oversight—to amend 12 U.S.C. 214-214c, which

authorize the conversion, merger or consolidation of national banks with state banks, and sections 215-215b, which authorize the consolidation or merger of national or state banks into national banks. These sections currently confine conversions, mergers or consolidations to the state in which the national bank is located. To achieve the intended purpose of Title X (and to create parity with the expanded merger authority of bank holding companies and thrift institutions), a specific amendment of these provisions is necessary. Again, we would be happy to provide drafting assistance in this respect.

APPENDIX MM

Affidavit of Carter H. Golembe (September 29, 1983) (Excerpt)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. H-83-654(TFGD)

NORTHEAST BANCORP INC. AND UNION TRUST COMPANY,

Plaintiffs,

against

BRIAN J. WOOLF, Banking Commissioner of the State of Connecticut,

Defendant.

City of Washington
District of Columbia } ss.:

CARTER H. GOLEMBE, being duly sworn, deposes and says:

1. I am a Senior Associate and Chairman of the Board of Golembe Associates, Inc. I make this affidavit in support of Plaintiffs' cross-motion for summary judgment in the instant action.

2. Golembe Associates, Inc. was founded in 1966 and is based in Washington, D.C. It provides professional consulting services to the financial industry in the area where

economics, law, and government meet to affect participating institutions. Golembe Associates, Inc. has a staff of more the 50 and provides professional services in the following areas: merger and acquisition consulting; financial advisory services; government affairs consulting; strategic planning; economic and public policy research; and deposit base valuations. A more complete description of the firm is found in the Annual Report attached as Exhibit A.

3. I received my Ph.D. in Economics from Columbia University and a Bachelor of Law from George Washington University. Prior to founding Golembe Associates, Inc. in 1966, I served as Deputy Manager of the American Bankers Association, and was a financial economist with the Federal Deposit Insurance Corporation from 1951 to 1960. I also served as special assistant to Senator Wallace F. Bennett during a portion of this period. I have written extensively on banking matters and am the principal author of the "Golembe Report," a series of interpretive reports on major public policy issues. I am co-author of *Federal Regulation of Banking* (Golembe Associates, 1983), a college-level textbook now in its third edition.

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I. *Government and Banking*

10. In the almost two hundred years since the adoption of the U.S. Constitution, no subject has excited more political emotion or raised more sensitive issues of federal and state prerogatives than banking. It was probably for this reason that neither banks nor the business of banking were mentioned by the drafters of the Constitution, the subject being deemed so controversial as to raise the

spectre of rejection of the new constitution should it be addressed. Yet in the economic and financial system that evolved over the following several centuries, the exercise of the monetary powers of government (and, more specifically, control of the banking system) has often raised issues of constitutional significance. This is the case today with the Interstate Act.

11. From the beginning, there was never any question that the monetary power—essentially control over the circulating medium—was and is a significant element of government sovereignty. As Bray Hammon put it, in his classic study of American banking: "[i]n terms of the Constitution and of common sense, control of the monetary system irrefragably belonged to sovereignity . . ."[1] Rather, the question was where that sovereignty lay—in the newly organized federal government or in the states. Was the federal government a mere creation of the states, limited to the exercise of the powers specifically granted it while the states, remaining sovereign, were the holders of all powers not relinquished? Or was the federal government sovereign, fully capable of exercising all of the indicia of sovereignity, whether explicitly or implicitly based on the words of the Constitution? It was the latter position that was taken by the first Secretary of the Treasury, Alexander Hamilton, when in one of the most significant monetary events in the nation's history he urged President Washington to approve the chartering by the federal government of the Bank of the United States:

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1. Hammond, Bray, *Banks and Politics in America,* (Princeton, New Jersey: Princeton University Press, 1957), p. 723.

> [T]his general principle is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, namely: That every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society.[1]

And it was Thomas Jefferson, among others, who took quite the opposite view in opposing, unsuccessfully, the federal government's first entry into the banking business, and entry probably intended to have, and certainly having in fact, the effect of exercising control over state banking institutions.

12. The matter of government sovereignity and the monetary power was not settled in 1791. Several decades later, in the early 1830s, the pendulum swung quite far in the other direction when President Jackson, with the support of agrarians and business entrepreneurs, destroyed the second Bank of the United States. To be sure, Chief Justice John Marshall, in *Craig v. Missouri* had made it quite clear in 1830 that under the Constitution the states could not furnish the nation's circulating medium through the issuance of bills of credit, or by instruments similar

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1. Opinion of Alexander Hamilton, February 23, 1791, in *Documentary History of Banking and Currency in the United States*, Ed. Herman E. Krooss (New York: McGraw Hill, 1969), p. 279.

in nature but passing under a different name.[1] His decision was thought to foreshadow the eventual end of state chartered banks—institutions that obviously were creatures of the states and that were, in fact, providing much of the nation's circulating medium in the form of banknotes and deposits. Yet in 1837, after Chief Justice Marshall's death, the Supreme Court in *Briscoe v. Bank of Kentucky* held that notes issued by state banks and used as circulating medium were not violative of the U.S. Constitution.[2] Because the charter of the second Bank of the United States had expired in 1836 and was not renewed by the federal government, *Briscoe* meant that, for all practical purposes, the monetary power of government had been finally lodged in the states, where it resided for the next three decades.

13. It was probably inevitable that the pendulum would swing again, returning to Hamiltonian doctrine. The immediate cause for this event was the Civil War. The North entered the war without a monetary system of its own and, indeed, with little if any control over the state banking system. It ended the war with its own banking system in place and had set the scene for restoration to the federal government of that element of sovereignity implied in power over the circulating medium. That power has resided in the federal government ever since.

14. The federal government created its own system of banks (i.e., national banks) in 1863. It issued its own currency during the war (the so-called Greenbacks) which the

1. 29 U.S. (4 Pet. *408) 249 (1830).

2. 36 U.S. (11 Pet. *256) 207 (1837).

Supreme Court eventually found to be constitutional in the *Legal Tender Cases* in 1870.[1] The *Briscoe* decision of 1837 was essentially overturned (or at least ignored) in 1869 (*Veazie Bank v. Fenno*) when the Court held that a prohibitive tax laid by Congress on state banknotes, in an effort to assure the primacy of federal circulating medium and to eliminate state banks, was constitutional.[2] To an economist at least, it would seem that even the existence of state banks is a matter of federal grace rather than constitutional privilege; a prohibitive tax on the note liabilities of state banks could as well be applied to the deposit liabilities of the same institutions.

15. In any event, Congress established a central bank in 1913 and insurance of bank deposits by an agency of the federal government was enacted in 1933. The constitutionality of the former had been settled many years before, in *McCulloch v. Maryland*[3]; the constitutionality of the latter (deposit insurance) was upheld in *Doherty v. United States.*[4]

16. It is of interest, and of some possible significance to issues raised by the Interstate Act, that the courts have gone beyond the narrow monetary clause of the Constitution to fix the constitutional locus of the monetary power held and exercised by the federal government. In *Norman*

1. 79 U.S. (12 Wall.) 457 (1870).
2. 75 U.S. (8 Wall.) 533 (1869).
3. 17 U.S. (4 Wheat. *315) 159 (1819).
4. 94 F.2d 495 (8th Cir. 1938).

v. Baltimore and Ohio, for example, the Supreme Court stated:

> The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers.[1]

17. The fact that banks are subject to the oldest and most pervasive system of regulation applied to any industry in this nation is testimony to the central role that such institutions play in the economy. As monetary institutions, commercial banks are the vehicles through which the bulk of the nation's money supply is created and held, so that government necessarily has a deep interest in the soundness and stability of the banking industry. As the primary mobilizers and allocators of credit, banks are also subject to the government interest attached to those functions. And, over time, government has become increasingly concerned with the uses to which bank credit is put.

18. That there are national economic goals to be obtained by, among other things, a properly functioning monetary system is beyond question. The Employment Act of 1946 legislated economic goals, which were expanded in the Humphrey-Hawkins Act of 1978. The latter calls

1. 294 U.S. 240, 303 (1935).

upon the President, the Congress, and the monetary authority to achieve "national economic priorities and objectives."[1] Nor is there any question of the importance of the banking system, and of the structure of that system, to the achievement of such goals. The Supreme Court was explicit on this point in *U.S. v. Philadelphia National Bank* when, in dealing with a significant structural question involving the proposed merger of two Pennsylvania banks, it said:

> Banking operations are varied and complex; 'commercial banking' describes a congeries of services and credit devices. But among them the creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important. For the proper discharge of these functions *is indispensable to a healthy national economy,* as the role of bank failures in depression periods attests.[2]

19. It is against this background that I find it easiest to consider the interstate banking question and the issues posed by Connecticut's Interstate Act. One must begin with the manner in which the federal government has shaped the present structure. In the McFadden Act of 1927 (as amended in 1933) the federal government concluded that its own institutions (national banks), as well as those state-chartered banks that had joined the Federal Reserve System, should not operate branches over any broader geographic area than the states in which they were

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1. 60 Stat. 23 (1946); Pub. L. No. 95-523, 92 Stat. 1487 (1978).

2. 374 U.S. 321, 326-27 (1963). (Emphasis added).

located.[1] Then, in an awkward effort to provide parallel treatment for those banking organizations designated as bank holding companies, Congress in 1956, in the Bank Holding Company Act, directed that an agency of the federal government (the Federal Reserve Board) should not approve the acquisition of a bank by a bank holding company if such bank was not located in the state in which the holding company did its principal business. However, in Section 3(d)—the so-called "Douglas Amendment"—the Federal Reserve Board was permitted to consider an application for an out-of-state acquisition if the statutory law of the receiving state explicitly permitted entry by this means.[2]

20. Geographic restraints on banking are founded on a variety of motives, most of which will not pass the test of economic analysis. They are, nonetheless, real, and range from a desire to preserve the soundness of the banking system by restricting competition to a fear of large concentrations of banking resources. Whatever the motives, the effect of geographic restraints on the banking structure is profound. The federal government, historically at least, has opted for a pluralistic or fragmented banking structure by taking the actions noted above, knitting the system together through a federal program of deposit insurance. But these have been federal decisions, implemented by federal law, and working through federal agencies.

21. An incidental effect of these federal decisions was to place each state in a position to fashion its own banking

1. 12 U.S.C. 36(c).

2. 12 U.S.C. 1842(d).

structure, i.e., branching or no branching; holding company banking (one-bank or multi-bank) or no holding company banking. To be sure it was always understood that the federal government could reverse this arrangement any time that it chose, at least for its bank and its agencies. Nor were the states given unrestricted authority over the banking structures within their own territories. The Bank Merger Act of 1966, for example, placed in the federal banking agencies authority over bank mergers.[1] Most recently, the Garn-St Germain Act of 1982 permitted federal agencies to arrange interstate acquisitions of failing, major commercial banks.[2] In each instance, it was concluded that the overall national interest in achieving a sound, competitive banking structure justified the exercise of this authority by the federal government.

22. Still, it is generally recognized that, within the bounds laid down by the Constitution and federal law, each state is able to determine the characteristics of its own banking structure. However, this "right" does not translate into a right to determine regional structure. There is not, so far as I am aware, any doctrine in the law of "regional states' rights." Indeed, I believe it is well settled that any multi-state arrangement which will have a

1. 12 U.S.C. 1828(c).

2. 12 U.S.C. 1823(b). Section 116 of Garn-St Germain provides that "notwithstanding section 3(d) of the Bank Holding Company Act or any provision of law, state or federal, or of the constitution of any state," in the case of a failed commercial or failing mutual savings bank, where the bank has assets in excess of $500 million, the FDIC may arrange for its acquisition by an out-of-state bank holding company. In selecting a purchaser, preference must be accorded possible in-state purchasers, following certain criteria set forth in the statute. If an out-of-state purchaser is selected, preference must be accorded to those in contiguous states.

significant negative impact on states excluded from such an arrangement and/or have a significant negative impact on efforts to achieve national economic goals would be offensive both to economic principles and to constitutional principles.

23. Connecticut's Interstate Act is clearly offensive to economic principles. Its effect, when taken in conjunction with the Massachusetts' statute and possibly other statutes in the New England states, is to create a kind of "common market" for interstate banking that benefits some banking institutions in New England and penalizes banking institutions in the excluded states, as well as those Connecticut banking institutions with business oriented toward excluded states. The benefits and penalties are easily illustrated.

24. Absent the formation of the new banking region, bank holding companies in any state in the Union may conduct a variety of banking businesses in Connecticut, subject only to an inability to do a deposit business through a bank subsidiary. Thus, prior to passage of the Interstate Act, bank holding companies headquartered, say, in Massachusetts and New York were on an equal competitive footing in Connecticut, in that they could do any kind of banking or bank-related business permissible under federal and state law for out-of-state banks or bank holding companies, but could not combine these activities with a deposit-taking business. Such a combination, heretofore available in Connecticut only to Connecticut banks, is a powerful competitive tool. But with passage of the Interstate Act, Massachusetts bank holding companies are provided with the new competitive tool while those in New

York are denied it. Thus even though, as will be shown later, there would appear to be a much closer economic relationship between Connecticut and New York than between Connecticut and Massachusetts when it comes to local banking markets, it is the New York bank holding companies that are suddenly placed in a subordinate competitive position in Connecticut as compared with Massachusetts companies. In effect, the Connecticut and Massachusetts legislatures, acting in concert, have decided that certain banking institutions will grow faster than would otherwise have been possible, while certain other banking institutions will grow more slowly than would otherwise have been possible, the distinction being solely whether they are located within or outside of the protective geographic area. Even within the protected area the two legislatures have altered significantly the relative competitive positions of banking organizations, enhancing the growth prospects of banking institutions whose markets and opportunities lie within the protected area, and diminishing, relative to their competitors, the competitive position and future growth prospects of banks whose markets and opportunities are directed toward the excluded states.

25. The issue is broader, of course, than just the relative positions of bank holding companies in the three named states. Wherever any group of states decides to set up a common market and exclude some states from that market, the effect will be to penalize the business concerns in the excluded states. This in turn must have an adverse impact on the economic development of the excluded states. In the design of the American banking system parochial interests will likely always be an important consideration, but parochialism that goes so far as to affect adversely the

economic welfare of other states or the achievement of national economic goals obviously must be avoided.

26. It has been suggested that, quite apart from any economic considerations, constitutional principles have been satisfied by the Douglas Amendment. To be sure, another incidental effect of that Amendment was that a state having no statutory provision for entry by an out-of-state bank holding company may, by remaining silent, burden interstate commerce. But it is a far different matter, in my opinion, to conclude that Congress intended granting to a state anything more than the simple power to remove the burden in its case and admit any out-of-state bank holding company, subject to appropriate regulatory approval. As a student of banking history and of the significance of the locus of control of the monetary system, it is inconceivable to me that Congress in the Douglas Amendment intended to give to each state the significant additional power of compacting or arranging with selected other states to create multi-state banking regions; power, in effect, sufficient to balkanize the American banking structure.

27. Neither the Douglas Amendment itself nor the legislative history of that amendment contains any mention of such a sweeping purpose. That silence is significant; had Congress intended to divest itself of so large a part of its sovereign power over the nation's money and banking structure—an action completely at odds with a century-long experience to the contrary—it clearly could have, and would have, said so.

28. Indeed, nothing that Congress has done since 1956 suggests that it ever contemplated so great a delegation of its power to the states. For example, Congress would

scarcely have provided in the recent Garn-St Germain Act that the federal insurance agencies could arrange for the acquisition of any large failed commercial bank by an out-of-state bank holding company (giving specific preference to companies in contiguous states which, in Connecticut's case it might be noted, includes New York) if it thought that Connecticut and Massachusetts could seal themselves off, and possibly the rest of New England as well, from the reach of this law.[1]

29. In summary, the relationship between government and banking is intimately related to the sovereign exercise of the monetary power. That power has been firmly lodged in the federal government for well over a century. The individual states have retained the ability, within limits defined by the federal government, to fashion their respective banking structures. However, the states have not, in my opinion, been accorded a power to carve the nation up into separate banking regions. Such a power would not serve, as is clearly not consistent with, national economic interests, nor does it seem to be in accordance with the principles underlying the federal Constitution.

• • •

/s/

Carter H. Golembe

Sworn to before me this
29th day of September, 1983

/s/

Notary Public
My Commission Expires July 31, 1985

1. As noted earlier (see par. 21 and note), in selecting among purchasers and bids, certain priorities or preferences are accorded in-satte bidders. In the consideration of out-of-state bidders, preference or priority is accorded bids from institutions of the same type as the failing institution (e.g., commercial banks or thrifts) and to institutions from contiguous states.

APPENDIX NN

Affidavit of Patrick J. Mulhern (April 12, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NOS. 84-4047, 84-4051, 84-4053

CITICORP, a Corporation,

Petitioner,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

State of New York)
County of New York) ss.:

AFFIDAVIT OF PATRICK J. MULHERN

IN SUPPORT OF PETITIONER'S REQUEST FOR A STAY

PATRICK J. MULHERN, being duly sworn, deposes and says:

1. I am Senior Vice President and General Counsel of Citicorp and Citibank, N.A., a subsidiary of Citicorp. In this capacity I have knowledge of all the operations of Citicorp and its subsidiaries in Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire and Maine ("New England") and throughout the United States. I have been involved for more than twenty years in the banking industry. I follow closely, and am often directly involved in,

developments concerning the structure of the banking industry. I have been involved numerous times in dealings with the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board"), the Comptroller of the Currency, the Senate and House banking committees and other regulatory bodies. I am fully familiar with the facts set forth below.

2. I am submitting this affidavit in support of Citicorp's request that this Court stay the effectiveness of separate Orders of the Federal Reserve Board, dated March 26, 1984, approving the proposed merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT"), and the proposed acquisition of Arltru Bancorporation ("Arltru") by Hartford National Corporation ("HNC"), respectively, pending final judicial review of Citicorp's challenge to those transactions. Copies of those Orders are attached as Exhibits A and B.

3. By this motion, petitioner is asking this Court to enter a stay which would prevent, for a relatively short period of time, the above-mentioned bank holding companies from completing transactions which are the subject of challenges on serious constitutional grounds both in this Court and in the United States District Court for the District of Massachusetts. Granting this request will avert imminent, serious and irreparable injury to petitioner and to the public at large. Absent such an order, these companies will be able, in a matter of days, to achieve their stated goal of insulating themselves unfairly from outside competition by taking steps which quite probably can never be successfully undone.

4. The impact of the decision of this motion, however, is not limited to the transactions directly challenged here. Rather, it involves the structure of banking in the United States. By the decisions challenged here, the Board has removed the critical constitutional issues raised by Citicorp from any further administrative consideration, so that additional regional interstate bank acquisitions will not ordinarily present any significant issue for the Board to consider. Thus, if there is no stay in this case, regional interstate banking will become a reality across the U.S., and the nation will be irretrievably balkanized by regional banking zones (zones which will all exclude the four principal "money center" states, New York, Illinois, Texas and California). All this will substantially and irreparably injure petitioner and other bank holding companies in the excluded states and will have occurred without a single federal court ever reviewing, even cursorily, the merits of the constitutional issues raised by the recently enacted regionally restrictive interstate banking statutes, including the Massachusetts and Connecticut statutes challenged here. Mass. St. 1982 c. 626 (the "Massachusetts Act"); Conn. Public Act 83-411 (the "Connecticut Act").

Nature and Background of this Dispute

5. Citicorp is a "bank holding company" within the meaning of section 2(a)(1) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841 *et seq.* (the "BHCA"), with its principal place of business in New York. It owns all of the stock of four banks. In addition, Citicorp owns (directly or indirectly) all of the stock of various non-bank corporations. Collectively, these Citicorp subsidiaries make loans and offer a wide variety of other

financial services to customers residing and/or doing business in New York, Massachusetts, Connecticut, Rhode Island and other parts of the country.

6. BNE is a bank holding company which has its principal place of business in Massachusetts and owns a number of Massachusetts banks. CBT is a bank holding company which owns a Connecticut bank and has its principal place of business in Connecticut. Arltru, the owner of a Massachusetts bank, is a bank holding company which has its principal place of business in Massachusetts. HNC is a bank holding company which has its principal place of business in Connecticut and owns at least one Connecticut bank.

7. Through its subsidiaries, Citicorp competes with CBT, BNE, HNC and Arltru and certain of their respective subsidiaries in making loans and offering other financial services to customers residing and/or doing business in, among other places, Connecticut, Massachusetts and Rhode Island. As described below, and as set forth in detail in the February 13, 1984 affidavit of Clarke Coggeshall ("Coggeshall Aff.") and the February 10, 1984 affidavit of Daniel A. Saklad ("Saklad Aff."), both filed in a related District Court of Massachusetts litigation discussed below, consummation of the proposed BNE/CBT merger or the proposed HNC/Arltru acquisition would seriously and irreparably injure petitioner. (Copies of these affidavits are attached (without exhibits) as Exhibits C and D hereto.)

8. On or about November 14, 1983, BNE filed an application with the Federal Reserve Board for approval of

BNE's proposed merger with CBT, as required under Section 3 of the BHCA. Similarly, on or about October 19, 1983, HNC filed an application with the Board for approval of its proposed acquisition of Arltru.

9. If consummated, the proposed BNE/CBT merger would result in an amalgamated bank holding company controlling banks in both Connecticut and Massachusetts. Similarly, the proposed HNC acquisition of Arltru would, if completed, result in a Connecticut bank holding company controlling a Massachusetts bank.

10. Under the so-called Douglas Amendment to the BHCA, 12 U.S.C. § 1842(d), the Federal Reserve Board may not approve the application of a bank holding company to acquire

> any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

11. In an effort to fit within the exception to the general prohibition of interstate bank acquisitions established in the Douglas Amendment, BNE and HNC have cited the Connecticut Act and the Massachusetts Act, which purportedly authorize these transactions.

12. In relevant part, these statutes are virtually identical, authorizing an out-of-state bank holding company to

acquire control of a Connecticut or Massachusetts bank, respectively, only if the acquiring bank holding company is a "New England bank holding company"—that is, it has its principal place of business in Massachusetts, Connecticut, Maine, Vermont, New Hampshire or Rhode Island (hereinafter "New England") and is not owned by a company with its principal place of business outside of New England (hereinafter "the regional restriction provision").

13. Under these statues, many New England bank holding companies would be able to establish or acquire direct or indirect control of full service banks (as defined in Section 2(c) of the BHCA) in Connecticut and Massachusetts. In particular, BNE and HNC contend that those statutes authorize the Board to approve their planned transactions. In contrast, by virtue of the regional restriction provisions of the Connecticut and Massachusetts Acts, non-New England bank holding companies—such as Citicorp—are absolutely barred from controlling a Connecticut or Massachusetts bank.

14. In addition, as set forth in the Coggeshall Aff., Citicorp contends that the Connecticut and Massachusetts Acts are part of a compact (the "New England Compact") among Massachusetts, Connecticut and Rhode Island, which allows New England bank holding companies to acquire or establish full service banks and conduct full service banking operations throughout New England, while barring non-New England companies from engaging in the same activities. The history of the development of the New England Compact and the reasons for its formation are set forth in

the Coggeshall Aff. It is not seriously disputed, however, that the principal purpose of the series of laws comprising the New England Compact is to exclude the so-called "money center" bank holding companies, including specifically Citicorp, from competing fully in New England, in order to "protect" local banks from full scale competition or possible acquisition.

The Federal Reserve Board Orders

15. Pursuant to 12 U.S.C. § 1842(b), Citicorp filed comments with the Board vigorously opposing the applications of BNE and HNC. These submissions by Citicorp are virtually identical. (Copies of Citicorp's letter and Memorandum, both dated December 5, 1983, filed with regard to the BNE application are attached (without exhibits) as Exhibit E.) Citicorp contended that: (1) as a result of their blatant geographic discrimination, the Connecticut and Massachusetts Acts violate the Compact Clause, the Commerce Clause, the Supremacy Clause, the Equal Protection Clause, and the Due Process Clause of the United States Constitution, and several provisions of the Connecticut and Massachusetts Constitutions, respectively; and (2) therefore, those statutes cannot serve as the basis for any exception from the general prohibition against interstate bank acquisitions established by the Douglas Amendment, and the BNE and HNC applications should be rejected as unauthorized.

16. On March 26, 1984, the Board issued its Orders approving the BNE and HNC applications. In doing so, however, the Board plainly recognized that substantial constitutional issues were raised by those applications. As the

Board stated, "the issue is not free from doubt . . . ." Nevertheless, the Board did not analyze those issues under normal standards of constitutional adjudication. Rather, it approved those applications on the grounds that it did not find a "clear and unequivocal basis" for a finding that the Connecticut and Massachusetts Acts are unconstitutional. Indeed, since the Board's March 26 Orders, Chairman Volcker has testified to Congress that the Board's determination was made despite "serious questions both about the constitutionality of such arrangements and their implications for public policy." (Statement of Paul A. Volcker, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, April 4, 1984, at 20, a copy of which is attached as Exhibit F.) Thus, unless stayed, the Board's Orders would allow the transactions to be consummated without any full decision of the merits of the constitutional issues which might require that the consolidations be barred.

17. On March 30, 1984, Citicorp filed with this Court its Petitions for Review of the Board's Orders. In addition, on April 2, 1984, Citicorp requested the Board to stay its Orders pending final review by the courts. (Copies of Citicorp's requests to the Board are attached hereto as Exhibit G.) On April 9, 1984, however, the Board rejected Citicorp's requests for stays of those transactions. (Copies of the Board's letters rejecting Citicorp's requests are attached as Exhibit H.)

18. Accordingly, Citicorp has been compelled to seek the requested stay from this Court. Citicorp also intends shortly to ask the court in *Citicorp* v. *Massachusetts Board*

of Bank Incorporation, Civil Action No. 83-3841C (filed December 7, 1983), to issue a preliminary injunction enjoining BNE, CBT and HNC (which are defendants in that case) from consummating their transactions pending resolution by the district court of the constitutional challenges to the Massachusetts Act and the New England Compact raised by Citicorp and certain of its subsidiaries in that case.

19. Citicorp has been forced to request this stay now because of the immediacy of the threatened consummation of the BNE/CBT and HNC/Arltru transactions and the irreparable injury to petitioner and the public that would then result. Pursuant to 12 U.S.C. § 1849(b) and Federal Reserve Board Regulation 12 CFR § 262.3(j)(l)(i), BNE/CBT and HNC/Arltru may consummate their transactions thirty days from the date of the Board's Orders, *i.e.,* April 25, 1984, unless those Orders are stayed. And, upon information and belief, they will do so as soon as that date arrives, only 13 days from today. If such consummation is not stayed, the structure of the entire banking industry will change irrevocably and petitioner will suffer irreparable injury, without any judicial or even plenary agency review of the constitutional issues relating to the Connecticut and Massachusetts Act and the New England Compact.

Changes Likely in the Status Quo of the Banking System if the Board's Orders Are Not Stayed

20. If the Court does not stay the effectiveness of the Orders of the Federal Reserve Board at issue here until the constitutional issues are finally decided, the status quo

will probably change permanently. Until reversed, the Board's decisions will remove the critical constitutional issues raised by petitioner from consideration at the administrative level. Since interstate bank acquisitions ordinarily will not present any other major issue under the BHCA, the Board presumably will approve all such transactions which come before it (absent unusual circumstances).

21. Based on my experience and involvement in interstate banking matters, I believe that this situation will result in a wave of interstate acquisitions, as companies move to consummate transactions before there is a judgment that the regionally restrictive interstate banking laws are unconstitutional. At least two other New England bank merger applications (both by Bank of Boston Corporation) are currently before the Federal Reserve Board. Moreover, many other New England bank holding companies will undoubtedly pursue mergers and acquisitions like those of BNE, HNC and Bank of Boston Corporation following any consummation of the BNE/CBT and HNC/Arltru transactions.

22. Even more significantly, consummation of these transactions will encourage other states to enact similar discriminatory, regionally restrictive interstate banking statutes, and to create new exclusionary regional banking zones. Indeed, the Board itself found that "no fewer than fifteen state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country." Moreover, the Board stated that "should the New England interstate banking zone be upheld, a system of regional zones may develop in major areas of the nation." Order Approving the Merger of

BNE and CBT at 6. Based upon my experience, I agree. State legislatures will rush to enact regional banking laws before they are declared unconstitutional. These state actions, in turn, will serve as the purported basis for numerous other interstate bank transaction agreements, which, I believe, will be executed rapidly upon, if not well before, enactment of legislation which would permit consummation of those acquisitions. In my judgment, the acquisition activity that will result could be so great that the entire structure of banking in this country could change in the next six to twelve months.

23. Indicative of the momentum that the regional banking idea has acquired are the statutes enacted and bills introduced in the 1983-84 state legislatures, which are set forth in the following list. Significantly, the list clearly shows that the regions of the country have been gerrymandered so as to exclude the four "money center" states —New York, Illinois, Texas and California.

24. The 1983-4 statutes and bills include:

Region	*State Enacting or Considering Legislation*	*States in Region Excluded*
Northeast	Connecticut (enacted), Massachusetts (enacted), Rhode Island (enacted),	New York
South	Georgia (enacted), Florida, Kentucky (enacted), South Carolina	Texas
Midwest	Iowa, Minnesota, Missouri, Nebraska, Wisconsin	Illinois
West	Arizona, Oregon (enacted), Utah (enacted)	California

25. The existence—and even the prospect—of regional interstate banking arrangements effectively prevents Citicorp from negotiating seriously with suitable banks or bank holding companies in other states whose acquisition by Citicorp would allow Citicorp to provide full-service banking to customers in those states. And, of course, the opening of the door to a wave of interstate transactions by favored bank holding companies will allow those consolidating bank holding companies to entrench themselves on an interstate basis and obtain advantages which could never be dispelled. Thus, allowing the two Board-approved acquisitions to proceed would be an invitation for the country to segment itself into artificial and distorted banking zones which would bring irrevocable injury to New York based Citicorp and severe disruption to the existing structure of our banking system.

The Need for a Stay: Petitioner's Irreparable Harm

26. The changes in the status quo absent a stay will be so substantial that, even if this Court ultimately finds the regional interstate banking legislation to be unconstitutional, the huge number of already-consummated interstate bank consolidations will create its own economic reality, which will inevitably require consideration and accommodation in shaping the remedy. The issue will not simply be whether the BNE/CBT merger and the acquisition of Arltru by HNC—the matters specifically before the Court now—can be unscrambled, but whether all the mergers and acquisitions which will have been consummated by that time can be dissolved. To the extent these transactions are not undone, Citicorp will suffer irreparable harm from the

increased competition it will face permanently from these entrenched, interstate consolidated entities.

27. Moreover, as noted in the Coggeshall Aff. ¶ 44, Exhibit C, the mere enactment of the Massachusetts Act and formation of the New England Compact have already caused injury to petitioner by, *inter alia,* preventing it, as a practical matter, from engaging in meaningful acquisition or merger discussions with desirable Massachusetts banks, while allowing BNE, CBT, HNC, Arltru and others not only to participate in such discussions, but also to reach agreements and obtain regulatory approvals. Now, the harm to petitioner from these state actions will be magnified in both scope and irreparability. If the BNE/CBT and HNC/Arltru transactions are allowed to be consummated at this time, the number of desirable potential acquisition partners available to petitioner (assuming petitioner will eventually be allowed to participate in similar transactions) would be irretrievably reduced, both through the consummation of these transactions and through the execution of other acquisition agreements which would be encouraged by the consummation of the BNE/CBT and HNC/Arltru transactions.

28. Additionally, these bank holding companies would have a chance to gain a competitive edge which might *never* be undone and which would irreparably injure Citicorp's efforts to establish a meaningful foothold in the New England region. As described in detail in the annexed Saklad Aff. (¶¶ 10-21) and Coggeshall Aff. (¶¶ 31-48) (Exhibits C and D), which are incorporated herein by reference, these advantages include: a multi-state banking presence which will be of considerable attraction to both commercial and consumer customers; marketing, advertising and ad-

ministrative advantages, and enhanced name recognition; increased credit and service capabilities; and increased capital bases. These advantages for BNE, CBT, HNC and Arltru would injury non-New England bank holding companies such as Citicorp in their efforts to offer financial services in, *e.g.*, Massachusetts and Connecticut, and would substantially harm Citicorp's profits, existing customer relationships and good will in Massachusetts, Connecticut and other New England states. For example, the large regional bank holding companies generally have had the most significant relationships with medium and large size corporations located in their respective states, while money center bank holding companies, such as Citicorp, have generally been second or third in such relationships. The new larger regional bank holding companies with their overall additional lending capacities and capital positions would be in a position to eliminate the money center bank holding companies in these relationships. This is because the corporate customer could rely on the larger regional bank for all banking services, including deposit services on a local basis, whereas the money center bank holding companies cannot provide this full range of services locally.

29. Furthermore, if any can consolidate now, BNE, CBT, HNC and Arltru will gain considerable marketing advantages, including increased name recognition and entrenched customer relationships, and will achieve substantial administrative economies of operations, through their interstate market presence and consolidations. As a result, they will no doubt attract new customers away from, *inter alia*, Citicorp's subsidiaries, and enhance existing relationships. After obtaining these customers, these bank

holding companies will have a continuing competitive advantage in providing financial services to them even if divestiture were later required. It is axiomatic that bank customers first seek financial services from the bank (and, indeed, the branch and personnel) with which they have or had a prior relationship. Thus, if BNE, CBT, HNC and Arltru are allowed to consummate these transactions now, they will have a "head start" which will enable them to increase their market positions and customer bases permanently, regardless of any subsequent court order, to the irreparable injury of petitioner. Obviously, this injury will be increased greatly by the large number of other consolidated entities which would also be able to gain such a "head start."

30. Moreover, BNE, CBT, HNC and Arltru and other combining bank holding companies presumably will argue that the injury suffered by competitors during the period in which their respective transactions were in effect cannot be recovered by those competitors because the consolidations were approved by the Federal Reserve Board.

31. Furthermore, once consummated, these transactions will likely be irreversible. For example, if their transactions are later invalidated, BNE and HNC may well argue that they nevertheless should not be dissolved because they have consolidated non-bank subsidiaries, because of the potential injury to their shareholders or because of other reasons. Other consolidating companies undoubtedly will also make such arguments. In addition, even if a court were to desire to enter an order of divestiture, the inequities and hardships to stockholders and customers which could result from such divestiture might well prompt

various New England state legislatures to enact legislation intended to immunize transactions completed prior to the judicial determination of the illegality of the New England Compact and its component statutes. As a result, petitioner is faced with the substantial possibility that these transactions, and the injury they would cause petitioner will be permanent from the moment they are consummated.

The Need for a Stay: Protection of the Public Interest

32. Permitting these transactions to go forward now would be undesirable for yet another important reason—the potential adverse impact on the public. If these transactions are consummated at this time, and the regional interstate banking statutes are ultimately found to be unconstitutional, the courts presumably will have to either (a) order the unscrambling of a very large number of completed consolidations all across the country; or (b) leave in place interstate transactions entered into pursuant to unconstitutional statutes.

33. The first course would be very difficult; public confidence in the stability and soundness of the banking system would be ill-served by the upheaval caused by sudden widespread bank holding company dissolutions. Investors in the consolidated companies, of course, stand to lose a great deal of money. Customers face the prospect that the "unscrambled" bank holding company with which they find themselves dealing would not be able to provide the same kinds and quality of service that the "scrambled" entity could offer. For example, customers who had been drawn to a merged entity because of its expanded capital

bases could awake one day to discover that the entity on which they had been counting has been replaced by smaller entities unable to meet the customers' needs. Of course, these injuries may be compounded many times since the approval of this transaction would encourage further mergers and acquisitions.

34. The alternative solution—leaving the consolidated entities intact despite the illegality of their joinder—would be equally unpalatable, for it would mean abandoning fundamental legal principles to a *fait accompli.* It is clearly not only Citicorp—but also bank holding companies in all the states that are being discriminated against—who will be injured if the Board's Orders are effectuated.

35. Moreover, the public's interest in the enforcement of constitutional standards is particularly acute when, as here, the objective of the constitutional challenge is to encourage the establishment of free competition in the provision of financial services. Such increased competition would greatly benefit the public, allowing consumers and businesses to obtain the most service at the lowest possible cost.

The Need for a Stay: Combining Companies Will Suffer No Significant Harm

36. Although the proposed consolidation of BNE/CBT has been pending since June, and the proposed acquisition of Arltru by HNC has been pending since at least September, no circumstance has arisen to my knowledge which threatens harm to either of the transactions (apart, of course, from the challenges by Citicorp and others to the

constitutionality of the Massachusetts Act, the Connecticut Act and the New England Compact). If some change were to occur in, for example, the value of one of the companies, the parties would still be free to restructure their arrangements.

37. Indeed, any supposed harm which these companies might suffer from a short delay is insignificant compared to the very real harm they and the public would surely suffer if they are allowed to consolidate and later are forced to dissolve their transactions. Unscrambling would require the merged entities to find some way to distribute assets and liabilities, restructure management and allocate shareholder interests. The confusion and expense that would result from having to unscramble these transactions would far outweigh any legitimate advantage these companies might gain from consummating their transactions prematurely.

38. In contrast to the insignificant loss, if any, these bank holding companies might conceivably suffer if the Court grants petitioner's motion, the loss petitioner will suffer as a result of the consolidations is, as described above, certain and irremedial. If the Orders of the Board are not immediately stayed, and BNE, CBT, HNC and Arltru prevented from going forward with their transactions, the relief petitioner seeks by opposing their applications and appealing the Board's Orders will be of no avail in remedying the bulk of the harm stemming, directly and indirectly, from the consummation of these transactions. And that irreparable injury will have occurred without any court reviewing the merits of plaintiffs' constitutional challenge.

Expedited Status

39. Finally, because of the irreparable harm facing petitioner and the public as described above, the likelihood that many other interstate bank acquisitions will occur under regionally restrictive statutes if these transactions are consummated, and the merit of petitioner's constitutional challenge (which even the Federal Reserve Board recognized), petitioner asks the Court to grant it expedited treatment in hearing and deciding these Petitions for Review. This request for expedition is appropriate whether or not a stay is in place because of the substantial uncertainty as to the final outcome of these transactions affecting petitioner, the customers and shareholders of BNE, CBT, HNC and Arltru, and the public at large.

/s/

Patrick J. Mulhern

Sworn to before me this
12th day of April 1984

/s/

Notary Public

ROSE E. SIGNORELLO
Notary Public, State of New York
No.30-3060315
Qualified in Nassau County
Certificate in filed in New York County
Commission Expires March 30, 1985

APPENDIX OO

Affidavit of James W. Quinn (August 8, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 84-4047, 4051, 4053, 4081

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, BANK OF BOSTON CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS and THE STATE OF CONNECTICUT,

Intervenor-Respondents.

AFFIDAVIT OF JAMES W. QUINN IN SUPPORT OF CITICORP'S MOTION FOR AN ORDER STAYING ISSUANCE OF THE MANDATE AND MAINTAINING THE STATUS QUO, AND IN OPPOSITION TO INTERVENORS' MOTION TO ACCELERATE ISSUANCE OF THE MANDATE

James W. Quinn, being duly sworn, deposes and says:

1. I am a member of the firm of Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York, attorneys for petitioner Citicorp ("petitioner") in this action.

2. Petitioner has instructed me to file an immediate petition for a writ of certiorari in this case, and we are preparing that petition.

Introduction

3. Recognizing the fundamental constitutional questions raised by the regionally restrictive Connecticut and Massachusetts interstate banking statutes, this Court on April 24, 1984 issued a stay of the March 26, 1984 Orders of respondent Board of Governors of the Federal Reserve System (the "Board") approving the merger of Bank of New England Corporation ("BNE") with CBT Corporation ("CBT") and the acquisition by Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru"). (Copies of the stay and petitioner's memorandum of law supporting the stay are attached as Exhibits A and B.)

4. On June 11, 1984, the Board stayed the third challenged Order, which had approved the acquisition by Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial"). This Court has affirmed that stay. (Copies of the stay and this Court's affirmance are attached as Exhibits C and D.)

5. The Board Orders and the Board's arguments to this Court sought the guidance of the courts, and recognized that the fundamental constitutional questions involved in this case are "ultimately for the courts to decide." *See* Order Approving the Application of BNE at 10; Brief of Respondent at 16. (Copies of these documents are attached as Exhibits E and F.) As Board Chairman Paul A. Volcker has stated, the Board simply acted

based upon an "*assumption* of constitutionality." Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System, Before the Senate Committee on Banking, Housing and Urban Affairs, March 27, 1984, at 32 (emphasis added). (A copy of Chairman Volcker's March 27, 1984 statement is attached as Exhibit G.)

6. Moreover, Chairman Volcker has recently testified before Congress that regional banking compacts raise "serious questions both about the constitutionality of such arrangements and their implications for public policy." Statement of Paul A. Volcker, Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, April 4, 1984, at 20. (A copy of Chairman Volcker's April 4, 1984 statement is attached as Exhibit H.)

7. On August 1, 1984, the Second Circuit affirmed the Orders of the Board approving the BNE-CBT, HNC-Arltru and BBC-Colonial transactions. Far from providing the Board with the guidance on the constitutional issues it had requested from the courts, the Second Circuit relied on and accorded "substantial deference" to the decisions of the Board. *See* slip op. at 9. (A copy of the Second Circuit's decision is attached as Exh. I.)

8. The Board, the Board Chairman and this Court have thus all recognized that fundamental constitutional issues are presented here. However, those issues are still unresolved, and petitioner respectfully requests that the Court stay its mandate and maintain the status quo pending prompt disposition of the case by the Supreme Court.

Effect on the Nation's Banking System

9. Consummation of the transaction at issue will be the first in a rapid series of steps that will change the present two-tiered banking system to a multi-tiered patchwork arrangement of law and mergers.

10. The haphazard nature of the regional laws was noted by Board Member Emmett J. Rice:

> "Finally, we come to the issue of regional interstate banking based on state action. Chairman Volcker expressed the Board's concern over this route to interstate banking in his congressional testimony on September 13, 1983. At that time, he expressed the view that regional banking would be a new form of Balkanization of the banking industry. Inconsistencies are already developing as states select their regional partners. For example, the Georgia law would allow entry by Kentucky banks, but the Kentucky law only allows entry by banks in states immediately adjacent to Kentucky."

Remarks of Emmett J. Rice, Member, Board of Governors of the Federal Resrve System, Before the National Association of Urban Bankers, June 21, 1984, at 10. (A copy of Governor Rice's remarks is attached as Exhibit J.)

11. The immediacy with which consummation of interstate transactions would proceed is apparent from the applications already filed with the Board or announced to the public. BBC, a Massachusetts bank holding company, has already applied to the Board for permission to acquire RIHT Financial Corporation, Inc., a Rhode Island bank holding company; HNC, a Connecticut bank holding company, has announced its intention to operate a bank in

Rhode Island; and Fleet Financial Group, Inc., a Rhode Island bank holding company, has applied to the Board to acquire *de novo* banks in both Massachusetts and Connecticut. Nor is the move toward regional banking limited to New England. Georgia, Florida, North Carolina and South Carolina have recently enacted regionally restrictive legislation setting up a Southeastern banking region, and Trust Company of Georgia has already announced plans to merge with Florida's Sun Banks, Inc.

Irreparable Harm to Petitioner

12. In addition to this nationwide impact, the Court's August 1, 1984 decision will also directly affect petitioner's operations throughout New England. As a result, upon consummation of the proposed transactions, petitioner will suffer serious and irreparable harm. Among the injuries to petitioner will be: (1) loss of desirable potential acquisition partners; and (2) loss of customers and revenue to the combined entities, due to the increased capital bases, multi-state banking presence, increased credit and service capabilities and name recognition advantages obtained by the combined entities as a result of the transactions. The serious harm to petitioner that will flow from these transactions is discussed in detail in the April 12, 1984 Affidavit of Patrick J. Mulhern in Support of Petitioner's Request for a Stay ("Mulhern Aff."), at ¶¶ 26-31, and the February 13, 1984 Affidavits of Clarke Coggeshall and Daniel A. Saklad, filed in a related action, at ¶¶ 31-48 and¶¶ 10-21, respectively. (Copies of these affidavits, without Exhibits, are attached as Exhibits K, L and M, respectively.)

13. The harm suffered by petitioner may never be recovered. Even if the transactions were later unscrambled,

customers drawn to one of the consolidated entities will not automatically discontinue doing business with the bank with which they have developed a relationship. Moreover, the transacting companies may well argue that unscrambling their transactions is no longer practicable or fair, and that damages cannot be awarded since their transactions were consummated pursuant to Board Orders. Although the transacting companies now allege that their proposed transactions can be unscrambled, they intend to take steps on the basis of which they may later allege that unscrambling is difficult or impossible. Following consummation of its merger, the BNE-CBT entity intends to acquire Maine National Corporation. HNC intends to obtain a Rhode Island bank after acquiring Arltru. BBC intends to acquire RIHT Financial Corporation, Inc. after it acquires Colonial.

14. The injury to petitioner described above will be compounded many times since consummation of the BNE-CBT, HNC-Arltru and BBC-Colonial transactions will encourage numerous similar and equally harmful transactions, both in New England and throughout the United States. As a practical matter, it presumably will be difficult to stay such other transactions if the instant transactions are permitted to proceed. The parties to the future transactions will likely point to the completion of the transactions challenged here as a basis in equity for permitting their transactions also to proceed.

The Serious Questions as to the Legality of the Proposed Transactions Have Not Been Resolved

15. The nationwide distortion of the banking system that will most likely ensue upon the consummation of the challenged transactions will be most unfortunate in light of the serious questions that continue to exist regarding the constitutionality of the regionally restrictive interstate banking statutes challenged here. *See supra* at ¶¶ 3,5,8. Petitioner contends that the August 1, 1984 decision was incorrect in a number of ways and, *inter alia*, conflicts with substantial Supreme Court precedent. Petitioner's substantive arguments to the Second Circuit are set forth in detail in the Petitioners' Brief and the Petitioners' Reply Brief. (Copies of these briefs are attached as Exhibits N and O.)

Irreparable Harm to the Public

16. Given the uncertainty that still exists with regard to the constitutionality of the Connecticut and Massachusetts Acts, to allow the challenged transactions to go forward would subject the public to irreparable harm. If the transactions are consummated and the Massachusetts and Connecticut Acts subsequently are declared unconstitutional, the courts will be forced to either (1) order the unscrambling of the completed transactions (and all other such consolidations that have been accomplished across the country), or (2) leave in place interstate transactions entered into pursuant to unconstitutional statutes.

17. If the transactions are unscrambled, shareholders and customers will lose money or be deprived of banking services, and public confidence in the banking system will be

undermined. If the transactions are allowed to stand, competitors of the consolidated bank holding companies will suffer irreparable harm, the nation's banking system will be left skewed, and constitutional principles will be sacrificed to a *fait accompli*. *See* Mulhern Aff., Exh. K, at ¶¶ 32-35.

The Potential Harm to Petitioner, the Banking System and the Public Outweighs any Threat of Harm to Intervenor Bank Holding Companies

18. The challenged transactions have been pending for many months. No circumstances have arisen to my knowledge which threaten any of these transactions (apart, of course, from challenges to the Massachusetts and Connecticut Acts and the New England Compact). Moreover, petitioner will petition expeditiously for certiorari to the Supreme Court.

19. Any injury to intervenors that might arise as a result of a delay in consummating the challenged transactions cannot compare to the threat of harm to petitioner and the public that will result from the radical change in the nation's banking structure that will follow such consummation.

* * *

CONCLUSION

20. For the reasons set forth above, in the Mulhern Aff. and in petitioner's accompanying Memorandum of Law, petitioner respectfully requests that the Court stay its mandate and maintain the status quo pending disposition of this case by the Supreme Court.

21. Petitioner also respectfully requests that the Court refuse, under any circumstances, to accelerate issuance of the mandate or take any other action that would allow intervenors to consummate their transactions before, at the least, the Supreme Court has ruled on a petition for emergency relief, which petitioner would file immediately upon any adverse determination of the present motion.

/s/
James W. Quinn

Sworn to before me this
8th day of August, 1984

/s/

Notary Public
STEPHEN A. RADIN
Notary Public State of New York
No. 31-4803514
Qualified in New York County
Commission Expires March 30, 1986

APPENDIX PP

Brief of the Board of Governors of the Federal Reserve System to the United States Court of Appeals for the Second Circuit (April 19, 1984)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84-4047

NORTHEAST BANCORP, INC. et al.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

Nos. 84-4051 and 4053

CITICORP

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Respondent.

RESPONSE OF RESPONDENT BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM TO PETITIONERS' MOTIONS FOR STAY

• • •

II. ARGUMENT

A. *Introduction*

These cases raise the issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes, and specifically, whether section 3(d) of the BHC Act authorizes the discriminatory treatment afforded by these state statutes to non-New England bank holding companies. The decision of this Court on the merits of these cases will have effects far beyond the facts of the particular acquisition and merger at issue herein. The Board believes that a prompt decision by this Court on the merits is not only warranted by the magnitude of the substantive issues involved but may also mitigate the need for the issuance of a stay.

• • •

MOTION FILED

OCT 4 1984

No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION IN SUPPORT OF THE PETITION

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN BANK, N.A.
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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OCTOBER TERM, 1984

No. 84-363

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BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, The Chase Manhattan Corporation respectfully moves for leave to file a brief *amicus curiae* in the above-captioned proceedings, and in support thereof states:

1. While the United States and petitioners have consented to *amicus'* filing, *amicus* has been unable to obtain the consent of all intervenor-respondents to the filing of the attached brief *amicus curiae.*

2. The decision of the United States Court of Appeals for the Second Circuit upholding the restrictive New England regional banking compact against constitutional challenges raises questions of far-reaching importance to the nation's banking system and the proper functioning of the federal system.

3. As explained more fully in the attached brief, the decision below will substantially and adversely affect the ability of *amicus curiae* to compete on equal terms in New England's full-service banking market. For that reason, *amicus* has a vital continuing interest in the outcome of this litigation that can only be protected by prompt review by this Court.

4. Accordingly, *amicus* seeks this opportunity to make known its views to the Court and assist the Court in its decision on the Petition for Writ of Certiorari.

Counsel for *amicus* hereby requests that the Court grant this Motion for Leave to File Brief Amicus Curiae and that the attached brief be accepted as part of the record in this case.

Respectfully submitted,

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN BANK, N.A.
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

* Counsel of Record

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IN THE

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OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

The Chase Manhattan Corporation is a bank holding company with its principal place of business in New York. Operating through The Chase Manhattan Bank, N.A., and other subsidiaries, it provides financial services to individuals, corporations and governmental entities throughout the United States and in more than 100 other countries.

This litigation raises questions of critical importance to Chase Manhattan and the nation's banking industry.

Long-standing federal policy has divided the nation into separate state banking units. That policy is eroding rapidly as banks encounter intense new competition from non-bank institutions that offer a wide range of financial services across state lines. To continue serving its customers effectively in this changing environment, Chase Manhattan, like many other banks, has been drawn into new geographic and product markets. Chase Manhattan's non-bank subsidiaries maintain offices in nearly twenty states, including Massachusetts and Connecticut.[1] Some services these non-bank subsidiaries offer compete directly with intervenor-respondents and other financial institutions based in New England. But the regional banking compact upheld by the court below deprives Chase Manhattan and other banks from disfavored states of an opportunity to compete on equal terms in New England's full-service banking market.

The New England regional banking compact is an avowedly protectionist scheme whose purpose and effect is to confer a competitive advantage on financial institutions in one section of the country[2] at the expense of

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[1] Chase Commercial Corporation, which provides asset-based lending and equipment lease financing, has offices in Boston and Canton, Massachusetts. Chase Home Mortgage Corporation engages in mortgage banking at offices in Boston and Waltham, Massachusetts. Chase National Corporate Services, Inc. has regional marketing offices in Stamford, Connecticut, and Boston, Massachusetts that promote Chase's commercial lending and other services. Chase Manhattan Financial Services, Inc. provides consumer and small business financial services at an office in Greenwich, Connecticut.

[2] The scheme does not uniformly benefit all financial institutions in the compact area. By limiting the class of eligible bidders for banks within the compact states, it depresses the price at which banks are sold—to the advantage of the acquiring bank and the disadvantage of the acquired bank. Not surprisingly, smaller banks that see themselves as possible merger partners with larger institutions have generally opposed the establishment of regional banking compacts.

financial institutions in other regions. Under the terms of the Massachusetts and Connecticut legislation, bank holding companies headquartered in any New England state are permitted to acquire a bank in Massachusetts or Connecticut. By contrast, bank holding companies headquartered outside the region[3] are disqualified, solely by reason of their state of origin, from acquiring banks within the state or otherwise offering full-service banking in head-to-head competition with the region's banks. The disqualification is effective even against a state, like New York, that offers to admit out-of-state banks on condition of reciprocity. Like all protectionist schemes, the compact also penalizes consumers in the relevant market by reducing competition—in this case, the competition for loans and deposits.

The New England compact is not an isolated response to unique historical or geographic circumstances. On the contrary, it signals the division of most of the nation into regional banking common markets, with boundaries gerrymandered to exclude certain boycotted states. In one of the orders under review, the Federal Reserve Board noted that legislative activity to establish exclusionary regional markets was underway or already completed in 15 states. The Board acknowledged the "potential danger" that upholding the New England compact would "divide the country into a number of banking regions." 70 Fed. Res. Bull. 374, 379 (1984) (A47). Movement in this direction has accelerated in the months

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[3] Sponsors of the compact have made no secret of its principal target: the major New York money center banks, including Chase Manhattan. The Massachusetts Act's sponsor, Senator John Brennan, says that the Act is to prevent entry of "big money center banks." N.Y. Times, April 3, 1983 (excerpts from Senator Brennan's statement appear at page 189 of the Appendix to the Petition for Writ of Certiorari, referred to hereafter as "A——)"). *See also* Conn. Senate Debate (May 18, 1983) (statement of Senator Sullivan) (A159); *Panelists Predict Bigger Regions Following Regional Banking Compacts*, 42 Washington Financial Rep. (BNA) 1081 (June 25, 1984) ("money-center banks in New York, California, and Illinois" are excluded from regional compacts).

following the Board's decision, and the emulation of New England's exclusionary policy by other regional blocs can only compound the injury to Chase Manhattan and other bank holding companies from disfavored states.

Given the importance of the questions presented and the dangers inherent in the Balkanization of the nation's banking system, Chase Manhattan submits this brief in support of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The regional banking compact upheld by the court below threatens a fundamental and irreversible change in the structure of the nation's banking system. This change will operate to the detriment not only of *amicus*, petitioners and many other financial institutions, but also of consumers of financial services. In addition, this unprecedented compact offends elemental constitutional principles expressed in the Commerce and Compact Clauses. Its explicit purpose is to make a benefit available to banks in favored states that is withheld from banks in disfavored states. The inevitable effect of such a compact is to invite reprisal and nurture a sectionalism so dangerous that the framers of the Constitution established constitutional protections to guard against it.

The regional banking compact at issue in this case is a paradigm of the overtly protectionist legislation this Court has repeatedly struck down under the Commerce Clause. Contrary to the assertion of the Federal Reserve Board and the court below, no federal legislation authorizes this unprecedented affront to constitutional principles governing the movement of goods and services in interstate commerce. The Douglas Amendment, on which the Board and lower court rely, falls far short of the express authorization this Court has previously considered essential to uphold otherwise impermissible state interference with interstate commerce.

Further, this Court has held that the Compact Clause requires congressional consent to multistate agreements

that encroach upon federal supremacy. The New England banking compact, to which Congress has not consented, encroaches upon federal supremacy in at least two respects. First, in an area of pervasive federal regulation its members seek to achieve a result through concerted action that no one of them could have accomplished on its own. Second, the compact aggrandizes the power of member states to the detriment of their sister states and harmonious relations within the federal system.

ARGUMENT

This action arises out of the Federal Reserve Board's approval of a merger and two acquisitions involving intervenor-respondents: six Massachusetts and Connecticut bank holding companies. In each instance, the parties to the transaction are located in different states. Petitioners—a Connecticut bank holding company, its wholly owned bank subsidiary, and a New York bank holding company—opposed the consolidations.

The Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*, prohibits the Board from approving interstate consolidations unless (1) the transaction is found to meet federal standards in the areas of competitive impact and financial condition and (2) the acquisition "is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d). The provision establishing this second requirement is known as the Douglas Amendment.

In the proceedings before the Federal Reserve Board, petitioners contended that the Massachusetts and Connecticut Acts could not furnish the necessary state law authorization for the acquisitions because they are unconstitutional under the Commerce, Compact, and Equal Protection Clauses of the Constitution. The Board conceded that it has little constitutional expertise (A39-41) and that "the issue is not free from doubt" (A41), but it nevertheless upheld the state legislation. It contended that the Douglas Amendment amounts to a "renunciation

of federal interest in regulating the interstate acquisition of banks by bank holding companies." (A52). On that premise, it concluded that Congress has authorized the states to take action that would otherwise violate the Commerce Clause and that the New England regional compact does not require the consent of Congress under the Compact Clause. The court below upheld the Board's orders, and petitioners seek this Court's review of that decision on the grounds that the compact violates the Commerce and Compact Clauses.

I. The Petition Should Be Granted Because It Raises Questions of Far-Reaching Importance to the Nation's Banking System.

The practical impact of the decision below is beyond dispute. It will unleash a wave of bank mergers and acquisitions both inside and, for defensive reasons, outside the protected regions. As banks scramble to preserve or enhance their competitive positions in a radically altered regulatory environment, the structure of the nation's banking industry will profoundly change. Given the virtual impossibility of undoing completed mergers, that change must be considered irreversible.

Immediately at issue are three transactions involving some of the largest banks in New England, including Bank of Boston Corporation, the biggest bank holding company in New England, with $19.5 billion in assets; CBT Corporation, the biggest bank holding company in Connecticut, with $5.9 billion in assets; and a number of other large financial institutions. Other consolidations are imminent.[4] As New England-style compacts are es-

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[4] Intervenor-respondent Bank of Boston received Federal Reserve Board approval on August 20, 1984 for a merger with Rhode Island's second largest commercial banking organization, RIHT Financial Corp. *Fed Lets Bank of Boston Acquire Right in 4th New England "Compact" Merger*, 43 Washington Financial Rep. (BNA) 346 (August 27, 1984). The Southeast restrictive regional banking network has generated a number of proposed mergers. *See, e.g., Here Comes Regional Banking*, Forbes, August 27, 1984, at 10; Edwards, *Wres-*

tablished throughout the country,[5] the repercussions will be felt in every one of the 50 states and the District of Columbia.

Although it approved the acquisitions, the Federal Reserve Board declined to comment on "the desirability, as a matter of national policy, of the regional arrangements provided for" by the state legislation at issue. 70 Fed. Res. Bull. 374, 379 (1984) (A34). In an effort to explain this apparent abdication of its regulatory responsibility, the Board stated that "the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action." *Id.*

In fact, proponents of regional banking *have* taken the issue to Congress,[6] but they have failed to obtain congressional authorization. Neither the House nor the

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tling with Mergermania, U.S. Banker, June 1984, at 36. *See also Financial Deregulation: Hearings on H.R. 5734 Before the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 435, 454 (1984) (statement of William B. Weaver, Vice-President of the First Boston Corp.). Regional, restrictive banking has also encouraged defensive mergers, both intrastate and among banks in non-compact states. *See generally* Edwards, *Wrestling with Mergermania*, and Wade, *The New England Regional Compact*, U.S. Banker, June 1984, at 45.

[5] Since the Board's March 26 decision, Florida, North Carolina, South Carolina, and Utah have enacted regionally restrictive banking legislation, Fla. C.S.H.B. 795 (1984); N.C. S.B. 706 (1984); S.C. S.B. 959, H.B. 3743 (1984); Utah S.B. 9 (1984), with the first three now joining Georgia, Ga. H.B. 1198 (1984), and Kentucky, KY. H.B. 67 (1984), in a Southeast banking compact. Legislative proposals for restrictive regional banking are now pending in many other states. *See, e.g.*, Bennett, *1985: Year for Regional Interstate Banking in the Midwest?*, American Banker, August 17, 1984, at 1 (Midwest is "following the lead of New England and the Southeast").

[6] *See* H.R. 2431, 98th Cong., 1st Sess. (1983) (proposed by Representative Frank of Massachusetts); S. 1002, 98th Cong., 1st Sess. (1983) (proposed by Senator Tsongas of Massachusetts). *See also* H.R. 5446, 98th Cong., 2d Sess. (1984).

Senate has even held hearings on the subject. A provision authorizing regional banking was included in an omnibus banking bill, the Financial Services Equity Act, S. 2851, 98th Cong., 2d Sess. (1984), that passed the Senate on September 13, 1984, but the Chairman of the House Banking Committee has given notice that the issue will not be taken up by his Committee or the House during the current session. Commenting on problem areas in the Senate bill, he noted that regional banking compacts "raise significant constitutional questions." [7]

House Judiciary Committee Chairman Peter Rodino voiced similar concerns in explaining the need for his Committee to hold hearings on any legislation to authorize regional banking compacts:

> By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause . . . .[8]

Surprisingly, the Board and the court below discerned no need for any further congressional action on this subject because they concluded that Congress had implicitly blessed regional banking compacts nearly 30 years ago when it passed the Douglas Amendment. 12 U.S.C. § 1842(d). But on its face, that Amendment says nothing whatsoever about regional banking. Nor does its

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[7] 130 Cong. Rec. H10005 (daily ed., Sept. 24, 1984) (statement of Rep. St Germain) *reproduced in* the Appendix to this brief at App.-4.

[8] Letter from Peter W. Rodino, Chairman, House Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the House (Sept. 14, 1984) *reproduced in* the Appendix to this brief at App.-1.

legislative history give any indication that Congress considered the possibility of discriminatory multistate arrangements, much less intended to approve them.[9]

In view of the implications of the New England banking compact for the nation's banking system and the uncertain (to say the least) authority for the proposition that nearly 30 years ago Congress somehow acquiesced in this monumental change in 1984, *amicus* submits that the questions raised by the petition for writ of certiorari urgently warrant this Court's review.

II. The Petition Should Be Granted Because It Raises Questions of Fundamental Importance to Federal-State Relations and the Proper Functioning of the Federal System.

Precipitating this fundamental recasting of the banking landscape is a multistate arrangement quite literally without precedent in our nation's history. *Amicus* is aware of no prior instance of a group of states' banding together to form an exclusionary market or free trade zone whose explicit purpose was to discriminate against goods or services originating in other states or regions. The Federal Reserve Board itself pointed out that there are

> no judicial decisions testing the constitutionality of state regulatory arrangements which discriminate in favor of residents of selected regional groupings of states and exclude residents of all other states from the benefits provided to the regional groups.

70 Fed. Res. Bull. 374, 379 (1984) (A50).[10]

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[9] The legislative history indicates consideration of regional banking only to this extent: In its report on the legislation, the House Banking and Currency Committee noted that legislative proposals had been made to permit national banks to branch on the basis of "trade areas" or Federal Reserve Districts. The Committee rejected such proposals as being without merit. H.R. Rep. No. 609, 84th Cong., 1st Sess. 203 (1955) (A132).

[10] As the Board noted, interstate agreements at issue in prior cases "have not had the objective of discrimination but rather that

The concept of an exclusionary regional common market flies directly in the face of fundamental precepts embedded in the Commerce and Compact Clauses of the Constitution. Action by one state to "protect its own inhabitants from competition," *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949), is troublesome enough. When a group of states combine forces to accomplish a similar result on behalf of the citizens of their entire region, the problem is greatly compounded. Indeed, a keen appreciation of the dangers of sectionalism was a powerful force behind adoption of the Constitution.[11] Time and again the constitutional debates reveal awareness of the dangers of partial "confeder-

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of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements." 70 Fed. Res. Bull. 374, 379 n.5 (1984) (A50 n.5).

House Judiciary Committee Chairman Rodino also noted the unprecedented nature of the proposed compacts:

> In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States to join; and the second being those that do not interfere with the Federal regulation of matters of national concern. In contrast, Title X [of S. 2851, which would approve regional banking agreements] would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

Letter to House Speaker O'Neill, *reproduced in* the Appendix to this brief at App.-1.

[11] In enumerating the reasons for adoption of the Constitution, Madison reported that "[i]t seems to be feared that the Northern States will oppress the trade of the South. . . . The middle States may apprehend . . . combinations against them between the Eastern and Southern states." Madison, *Debates in the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 398, 69th Cong., 1st Sess. 384-87 (1927). "[D]ifferent interests" would lead regions of the nation to "oppressive regulations" of commerce. *Id.* at 633-38.

acies" or "combinations."[12] Hamilton warned that "[e]ach . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions which would beget discontent." *The Federalist Papers* No. 7 at 62-63 (Rossiter ed. 1961).

It was in large measure to guard against just such sources of sectional rivalry and discontent that the framers crafted the Commerce and Compact Clauses of the Constitution. Each of these Clauses requires invalidation of the New England banking compact.

A. The Massachusetts and Connecticut Acts Violate the Commerce Clause.

The Massachusetts and Connecticut Acts discriminate against out-of-state bank holding companies that seek to acquire local banks solely by reference to their state of origin. These Acts are paradigms of the overtly protectionist legislation repeatedly struck down by this court as *per se* violations of the Commerce Clause. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[13] Even assuming *arguendo* that the Massachusetts and Connecticut statutes were enacted to promote some colorably legitimate state interest—and the record below makes clear that they were not—the statutes would nevertheless violate the Commerce Clause. They impose a substantial burden on interstate commerce that is unnecessary to meet any proffered state interest. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36-37.

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[12] *Id.* at 239-40, 245, 292, 298-99, 302, 304, 315, 372, 374, 382.

[13] The Commerce Clause gives Congress plenary power "to regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. The negative implications of the Commerce Clause also limit the power of the states to interfere with interstate commerce. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976).

This Court has identified an economic[14] and a political[15] element underlying the Commerce Clause. The Massachusetts and Connecticut statutes offend both. Economically, they create a new regional banking market from which out-of-region banks are excluded. Politically, they impose the burdens of the legislation squarely on persons excluded from the compact states' political processes.

Congress can, of course, authorize states to enact legislation that would otherwise violate the Commerce Clause,[16] though this Court has never had to consider whether Congress could authorize the kind of overt discrimination among states that characterizes the New England compact. In any event, the authorization must be "unmistakably clear." *See, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984). That requirement serves not only to eliminate doubt about the will of Congress; it also assures that adversely

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[14] *See H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949):

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 527 [1935] . . . "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

[15] Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subject to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938). *See also Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945).

[16] The Board noted that "[a]bsent congressional authorization of [the Connecticut statute] in the Douglas Amendment, it appears the [statute] would be inconsistent with the standards for state action under the Commerce Clause as established by the Supreme Court." 70 Fed. Res. Bull. 374, 381 (1984) (A55).

affected interests will have fair notice and an opportunity to participate in the resolution of the issue. As this Court stated last Term:

> [W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Id. at 2243.

The Douglas Amendment falls far short of the "express" authorizations this Court has previously found necessary to save state statutes that would, but for the authorization, constitute impermissible interference with interstate commerce.[17]

The opinion of the court below nowhere explains how the language or legislative history of the Douglas Amendment could reasonably be said to furnish "unmistakable evidence" that Congress intended to grant the states plenary power over banking acquisitions or the authority to condition their approval of interstate mergers on grounds that are blatantly discriminatory or otherwise offensive to well-accepted constitutional principles. Indeed, there is no indication that Congress even considered the power of a single state—much less a group of states—to discriminate among out-of-state banks solely

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[17] In the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, for example, Congress unmistakably conferred on the states plenary power to regulate insurance. Section 1, 15 U.S.C. § 1011, provides:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

on the basis of their state of origin.[18] Under these circumstances, the state statutes at issue here must be considered unconstitutional under the Commerce Clause.

B. The Massachusetts and Connecticut Acts Violate the Compact Clause.

The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." Art. I, § 10, cl. 3. Application of that Clause depends upon a finding that (1) two or more states have entered into a compact; (2) the compact is of a type that requires congressional consent; and (3) Congress has not consented. *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981); *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 467-71 (1978).

The first and third points present no difficulty in this case. A compact need not be explicit or in writing, *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893), and it may be found in reciprocal legislation alone. *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 469-70 (1978). Given the legislative history of the New England compact, which shows an unmistakable intention on the part of Massachusetts and Connecticut to act in concert, the Board had no difficulty concluding that their reciprocal statutes constitute an interstate compact. 70 Fed. Res. Bull. 374, 380 (1984) (A51-A52).

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[18] The Federal Reserve Board was more candid about the difficulty of finding "unmistakable evidence" that the Douglas Amendment saves the New England compact. It noted that the Amendment "does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states," 70 Fed. Res. Bull. 374, 384 (1984) (A65) (emphasis supplied), and that it does not appear to meet "the stringent test of explicitness laid down by the Supreme Court." *Id.*

Nor can there be any doubt concerning the absence of congressional "consent" to the compact at bar.[19] Whatever the Douglas Amendment means, it surely does not constitute consent within the meaning of the Compact Clause. It makes no reference to compacts of any kind, and the debate surrounding its enactment contains no scrap of evidence to suggest that Congress intended by its passage to pre-authorize[20] a breed of compact that no one had yet thought to propose.

The issue before this Court, therefore, is whether the New England compact is the type of "Agreement or Compact" that is necessarily invalid (whatever its other infirmities) in the absence of congressional consent. This Court has noted that the Compact Clause requires congressional consent for agreements between states that "tend to increase and build up the political influence of the compacting states, so as to encroach upon or impair the supremacy of the United States." *See United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 467 (1978) (quoting from *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893)).

The court below offered neither reason nor citation in support of its one-sentence conclusion that the New England banking compact would not "encroach upon or impair the supremacy of the United States." In fact, the compact will have precisely that effect in at least two distinct ways. First, it intrudes upon the pervasive fed-

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[19] The Board noted that "in form" the New England compact was a "compact or agreement that has never been approved by Congress." It then proceeded to argue that no consent was necessary. 70 Fed. Res. Bull. 374, 380 (1984) (A52).

[20] Congress disfavors the pre-authorization of compacts. Judiciary Committee Chairman Rodino, in a letter to House Speaker O'Neill, *supra* at p. 8, states that "[t]ypically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences." App.-1.

eral regulation of interstate banking. Second, it aggrandizes the power of compact states to the detriment of their sister states.

1. ***Interference With Federal Regulatory Authority.***

The Federal Reserve Board and the court below maintained that the New England compact could not encroach upon federal regulatory authority in the area of interstate banking because Congress renounced that authority in the Douglas Amendment. (A29, A52). That position rests on a fundamental misapprehension of the language, history and purpose of the Douglas Amendment and ignores the federal government's pervasive regulation of interstate banking.[21]

On its face, the Douglas Amendment does not disclaim federal authority and responsibility. On the contrary, as this very litigation illustrates, the Bank Holding Company Act, of which the Douglas Amendment is a part, establishes as one of the conditions for an interstate bank acquisition review and approval by a federal agency, the Federal Reserve Board, which tests the acquisition under federal standards. *See* 12 U.S.C. §§ 1842 (a) and (d).[22] Out of deference to state concerns, the Douglas Amendment provides that an acquisition is *not* permitted unless, among other conditions, it is specifically authorized by the law of the state in which the acquired bank is located. That hardly suggests federal indifference to the conditions under which such acquisitions *do* take place.[23]

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[21] *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

[22] The Board's criteria for approving acquisitions indicate the pervasive nature of the federal government's regulatory control. The Board must assess potential anticompetitive effects of acquisitions, and it may approve an anticompetitive acquisition only if in the "public interest." 12 U.S.C. § 1842(c). The Board must further evaluate the involved banks' financial and managerial resources and the needs of the relevant communities. *Id.*

[23] Recent amendments to the Douglas Amendment illustrate the continuing federal role in defining the conditions under which in-

In setting federal policy in this area, Congress has declined to give express approval to regional banking. Yet Connecticut and Massachusetts now seek to accomplish what Congress has declined to do. Through their joint action these states would bring about a result that neither could have achieved on its own.[24] The Compact Clause was designed to safeguard federal interests in precisely such a case by requiring that the state parties to the agreement first obtain congressional consent.

It is surely no answer to say, as did the court below, that Congress can adequately protect its interests by subsequently enacting legislation to restore the status quo. (A32). That reasoning stands the Compact Clause on its head. The plain intention of the framers was to put the burden of obtaining congressional approval on the states that seek to establish a compact, not to make the opponents of a compact—including Congress itself—initiate action to disapprove it.

2. *Aggrandizement of State Power at the Expense of Other States.*

The New England compact encroaches on the supremacy of the United States in a second sense: It seeks to aggrandize the power of compact states at the expense of

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terstate mergers can and cannot take place. The amendments allow federal authorities to arrange interstate acquisitions to facilitate the salvage of failing or failed banks even where such acquisitions are not permitted under state law. *See* 12 U.S.C. § 1823(f), enacted as part of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982).

[24] In contrast to the situation in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), the result that Massachusetts and Connecticut seek depends upon their joint action. These two states have not only enacted parallel rules to govern their relationship with the country as a whole, they have also agreed to treat each other differently from the way they treat the rest of the country. That differential, necessarily brought about by agreement and not simply parallel action, is the very reason-for-being of their arrangement.

their sister states. It is in large part because compacts "may affect the interest of States other than those parties to the agreement . . . [that] Congress must exercise national supervision through its power to grant or withhold consent . . ." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1926). *See also Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855) (Compact Clause serves to protect "the rights and interests of other States, and to prevent any compact or agreement betwen any two States, which might affect injuriously the interest of the others"); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (Compact Clause is designed to "guard against the derangement of [a state's] federal relations with the other States of the Union, *and* the federal government") (emphasis supplied); *United States v. Tobin*, 195 F. Supp. 588, 606 (D.D.C. 1961) (under the Compact Clause "Congress has a two-fold duty: . . . to prevent undue injury to the interests of non-compacting states" and to protect the interests of the federal government) (citations omitted). The compact at issue in this case not only has the effect of injuring interests in other states, it is *intended* to "redound to the benefit of [a] particular group of States [and] to the harm of others." [25] For this reason, too, the

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[25] *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 477 (1978). The Court implicitly recognized in that case that a compact enlarging the power of some states at the expense of others can, for purposes of Compact Clause analysis, be said to encroach upon the supremacy of the United States. Those who challenged the compact, which any state was free to join, alleged that the agreement would impair the sovereign rights of nonmember states. 434 U.S. at 477. The Court rejected the argument on the basis of a finding that the compact did not, in fact, "redound to the benefit of any particular group of States or to the harm of others." *Id. Cf. New York v. O'Neill*, 359 U.S. 1, 6 (1959) (upholding, despite the absence of congressional consent, a compact that was not "divisive" but rather "increas[ed] harmony within the federalism created by the Constitution"). Significantly, the Court did not dismiss the contention as irrelevant to Compact Clause analysis.

absence of congressional consent is sufficient to require its invalidation.

Indeed, agreements between states that encroach upon the power of their sister states have on occasion been said to fall under the Treaty, Alliance or Confederation Clause of the Constitution, Art. I, § 10, cl. 1, rather than the Compact Clause. *See, e.g., Ford v. Surget*, 97 U.S. 594, 603 (1878); 1 W. Blackstone, *Commentaries*, Appendix 310 (S. Tucker ed. 1803); *cf. United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 466-67 n.18 (1978) (quoting *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833) (Marshall, C.J.)). The Treaty, Alliance or Confederation Clause unequivocally *prohibits* such combinations, whether or not they receive congressional consent.[26]

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[26] Moreover, the Massachusetts and Connecticut Acts arguably violate the Equal Protection Clause, U.S. Const. amend. XIV, § 1. The court below, in upholding the Acts against an equal protection challenge, maintained that the legislation was rationally related to a hypothetical commercial purpose. It is far from clear, however, that a statute drafted solely for the purpose of regional protectionism and discrimination is rationally related to a legitimate state purpose. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J., plurality) ("rational-basis standard is not a toothless one") (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)). Furthermore, the court below did not even consider whether the nature of the classification—discrimination on the basis of residence in a particular state or region—may require heightened equal protection scrutiny. *See Plyler v. Doe*, 457 U.S. 202 (1982) (applying intermediate level of review).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN BANK, N.A.
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

* Counsel of Record

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

APPENDIX 1

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, D.C. 20515
Telephone: 202-225-3951

September 14, 1984

Honorable Thomas P. O'Neill, Jr.
The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The "Financial Services Competitive Equity Act" (S. 2851), which was debated on the Senate floor during the past week, will reach the House shortly. On behalf of the Committee on the Judiciary, I am writing to you to request that this bill be referred to this Committee for consideration and possible action as a result of certain provisions which substantially affect matters coming within Rule X jurisdiction of the Committee.

In particular, Title X of S. 2851 contains language that would grant prior Congressional consent to certain groupings of States to enter into interstate compacts involving regional banking activities. It is important that this Committee—which has jurisdiction over interstate compacts generally—be permitted to review the language and intent of this provision because Title X on its face appears to be a major departure from past practice in the manner in which Congress approves an interstate compact consistent with the Compact Clause of the Constitution. In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States seeking to join; and the second being those that do not interfere with the Federal regulation

of matters of national concern. In contrast, Title X would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

In addition, Title X departs from past Congressional practice and procedure in that it would grant prior approval to such compacts rather than to require subsequent approval on a case-by-case basis. Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. Title X would, in essence, preauthorize compacts without advanced review of the content or standards contained in those agreements. While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and and thoughtful deliberation of the potential consequences. The Judiciary Committee—the Committee of jurisdiction in this instance—has had no such opportunity to develop a record or engage in any deliberations on the potential Constitutional and economic implications of Title X.

By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country.

Title X also has important implications for the Federal antitrust laws, also a subject matter within the jurisdiction of the Judiciary Committee. The cornerstone of American antitrust law is the principle that unrestrained competition will yield the best allocation of our economic

resources, thus benefitting the interest of consumers. Because such compacts as provided by Title X may work to restrict competition for deposits and loans, the price for that type of restriction might well be paid by consumers. The implications of this legislation for the national competition policy will therefore also need careful scrutiny by this Committee.

For the above reasons, I request that you refer S. 2851 to the Judiciary Committee for its review. Furthermore, it is requested that Members of this Committee be included in any conference on S. 2851.

With best wishes,

Sincerely,

/s/ Peter W. Rodino, Jr.
PETER W. RODINO, JR.
Chairman

PWR:jyl

APPENDIX 2

STATEMENT OF CHAIRMAN FERNAND J. ST. GERMAIN ON FLOOR OF THE HOUSE OF REPRESENTATIVES

SEPTEMBER 24, 1984

LOOPHOLE CLOSING LOST IN THE BRANCHES OF THE CHRISTMAS TREE

* * * *

The Senate, * * * on September 13 adopted what can only be accurately described as a Christmas tree festooned with brightly colored ornaments of all shapes and sizes—credit union amendments, export trading company provisions, a basket of new powers for bank holding companies including new securities activities, consumer leasing amendments, new rules for brokered deposits, preemption of state usury laws, green-mail, golden parachutes provisions amending securities statutes, regional banking compacts which raise significant constitutional questions, new powers for savings and loan associations . . . the list goes on and on. The implications of these provisions won't be known for months, and in some cases, years. The legislation is so far ranging and so broadly drafted that at least three House Committees have jurisdiction—Banking, Energy and Commerce and Judiciary.

None of us on the House Banking Committee would feel comfortable in standing up on this floor in the remaining few days of this Congress urging our colleagues to accept any part of this conglomeration on which neither we nor the Energy and Commerce nor Judiciary Committees have had hearings or markup and on which we all know there is a wide divergence of opinion. It would be a shot in the dark which we and the nation might regret for years to come.

* * * *

* * * Every member of the House, I am sure, quickly perceives the difficulties of asking for consideration of a massive rewriting of key statutes covering banking, securities, and interstate commerce when there have been few hearings, votes or debate. In fact, in most cases, absolutely none.

Completely aside from the political realities in the House, we must look at the fact that we are talking about a monumental change in banking and its relationship to the rest of the economy. A fundamental shift that may well determine how credit is delivered, financial services dispensed, and the entire economy structured for decades to come. This is not the stuff of quickie midnight conferences in the closing hours of the session.

Not only is there a major concern about what these new powers may mean to the economic future of the nation, but also to the safety and soundness of the banking industry, itself.

* * * *

The Banking Committee will be considering these issues in the next session. I regret that it is not possible to move the loophole closing legislation this session, but it is obvious that the Senate will not consider it unless we buy off on new powers. Again, something that I know would be a futile effort in the House at this moment.

* * * *

Office - Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY AND CITICORP
Petitioners

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM
Respondent

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION, THE
COMMONWEALTH OF MASSACHUSETTS, THE STATE OF
CONNECTICUT AND BANK OF BOSTON CORPORATION
Intervenor-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER, IN OPPOSITION TO PETITION

JOSEPH I. LIEBERMAN
Attorney General

ELLIOT F. GERSON
Deputy Attorney General

JOHN G. HAINES*
Assistant Attorney General

P.O. Box 120
Hartford, Connecticut 06101
Tel. (203) 566-4899

*Counsel of Record

QUESTIONS PRESENTED

Congress provided in the Bank Holding Company Act (the "BHCA") that any acquisition of a bank by a bank holding company must be approved by the Federal Reserve Board. Congress further provided in the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d), that a bank holding company whose principal operations are in one state may not acquire a bank in another unless specifically authorized by the laws of that state. Against this background the following questions are presented.

1. Whether the provisions of the Connecticut Interstate Banking Act, which allow Connecticut banks to be acquired by similar institutions in the other New England states which grant reciprocal rights to Connecticut banks, are authorized by the Douglas Amendment and thus do not violate the Commerce Clause?

2. Whether the reciprocal provisions of the Connecticut and Massachusetts Interstate Banking Acts constitute an interstate agreement increasing the power of the states in a manner which interferes with federal supremacy in violation of the Compact Clause?

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
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THE BOARD OF GOVERNORS OF
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CONNECTICUT AND BANK OF BOSTON CORPORATION
Intervenor-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER, IN OPPOSITION TO PETITION

The State of Connecticut and Brian J. Woolf, its Banking Commissioner, submit this brief in opposition to the petition for a writ of certiorari filed by Northeast Bancorp, Inc., Union Trust Company, and Citicorp.

STATEMENT OF THE CASE

The Petitioners claim that the Connecticut Interstate Banking Act and a similar law in Massachusetts violate the Commerce and Compact Clauses of the Constitution in that they only allow Connecticut and Massachusetts banks and bank holding companies to be acquired by banks and bank holding companies in the other New England states. The State of Connecticut asserts that its Act is authorized by §3(d) of the Bank Holding Company Act, 12 U.S.C. §1842(d), and that the reciprocal provisions of the Connecticut and Massachusetts Acts do not violate the Compact Clause.

The Bank Holding Company Act ("the BHCA"), 12 U.S.C. §1841 *et seq.*, provides for federal regulation of the creation and operation of bank holding companies. Section 3 of the BHCA requires that any acquisition of control of a bank by a corporation or partnership must be approved by the Federal Reserve Board. Section 3(d) of the BHCA, commonly known as the "Douglas Amendment," precludes the Federal Reserve Board from approving any application by which a bank holding company proposes to acquire an interest in a bank

> located outside the state in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 . . . ***unless [such acquisition] is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.***

12 U.S.C. §1842(d) (emphasis added).

The Douglas Amendment thus establishes a general bar under federal law to the acquisition of a local bank by an

out-of-state bank holding company but permits a state to enact specific legislation lifting this bar.[1]

By §§2 and 3 of Connecticut Public Act 83-411, the Connecticut Interstate Banking Act ("CIBA"),[2] the State of Connecticut accepted Congress' invitation to lift the bar of the Douglas Amendment. The State of Connecticut, however, does not read the authorization of state action in the Douglas Amendment as presenting a choice between no interstate banking (by leaving the federal bar in place), or unlimited interstate banking. In order to assess the benefits and detriments of interstate banking, the Connecticut General Assembly chose to authorize an experiment in interstate banking and to limit the scope of the experiment to the New England states. (*See* Res. Conn. App. at 6a). Thus, the above-referenced provisions of the CIBA permit Connecticut banking institutions to acquire or be acquired by banking institutions located in the other New England states (Massachusetts, Rhode Island, New Hampshire, Vermont, and Maine) provided they have adopted reciprocal legislation which the State Banking Commissioner finds is no more restrictive than the Connecticut Act.

The Commonwealth of Massachusetts had adopted similar legislation in 1982,[3] which the Connecticut Banking Commissioner has found is no more restrictive than the CIBA.[4]

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[1]The only exception to the state line geographic restrictions on bank expansion in federal law is provided by 12 U.S.C. §1823(f) dealing with emergency acquisitions of failing institutions.

[2]Pet. App. at A97-100.

[3]Mass. Gen. Laws Ann. ch. 167A §2 (West 1971 & Supp. 1984), Pet. App. 101-102.

[4]Within New England, Rhode Island and Maine have also adopted interstate banking provisions. The Maine Act, Me. Pub. Law 1983, ch. 302, §2 as amended (1984), permits unlimited interstate banking. The Rhode Island Act, R.I. Pub. Law S 0661 Sub. A (1983), limits acquisition of its banks to bank holding companies located in the other New England states, but this restriction expires in 1986.

Pursuant to the BHCA and the state Acts, the Federal Reserve Board approved three applications for mergers or acquisitions by Connecticut and Massachusetts bank holding companies.[5]

In the proceedings before the Federal Reserve Board, petitioners, Northeast Bancorp, a Connecticut bank holding company and its subsidiary Connecticut bank, the Union Trust Company (collectively "Northeast"), and Citicorp, a New York bank holding company, opposed these transactions claiming, *inter alia,* that the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses of the Constitution. The Federal Reserve Board rejected these claims finding that "there is no clear and unequivocal basis for a determination that CIBA is inconsistent with the Commerce Clause, Compact Clause or Equal Protection Clause of the United States Constitution." *Bank of New England Corporation,* 70 Fed. Res. Bull. 374 (1984) (Pet. App. at A41). The same finding was made with regard to the Massachusetts Act. 70 Fed. Res. Bull. 353 (1984) (Pet. App. at A75).

Northeast and Citicorp appealed the Federal Reserve Board's rulings to the Second Circuit, again claiming that the Board's orders approving these transactions were unlawful because the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses of the Constitution. The Court of Appeals found both arguments plainly without substance.

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[5]Bank of New England Corp. ("BNE"), a Massachusetts bank holding company application to acquire CBT Corp. ("CBT"), a Connecticut bank holding company, 70 Fed. Res. Bull. 374 (1984), Pet. App. at 34-71; Hartford National Corp. ("HNC"), a Connecticut bank holding company application to acquire Arltru Bancorporation ("Arltru"), a Massachusetts bank holding company, 70 Fed. Res. Bull. 353 (1984), Pet. App. at 72-78; and Bank of Boston Corp. ("BBC"), a Massachusetts bank holding company application to acquire Colonial Bancorp ("Colonial"), a Connecticut bank holding company, 70 Fed. Res. Bul. 524 (1984), Pet. App. at 79-87.

With regard to the Commerce Clause, the Court of Appeals held that the Connecticut and Massachusetts Acts were authorized by Congress in the Douglas Amendment. (Pet. App. at A31). As to the Compact Clause, the Court held that, even if the Connecticut and Massachusetts Acts were treated as a compact, they would not violate the Compact Clause because under the test stated by this Court in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978), there is no "combination tending to increase the political power in the states, which may encroach upon or interfere with the just supremacy of the United States." (Pet. App. at A32). Accordingly, the Court affirmed the orders of the Federal Reserve Board.

SUMMARY OF ARGUMENT

1. The provisions of the Connecticut Interstate Banking Act (Conn. P.A. 83-411, §§2, 3) which permit Connecticut banks and bank holding companies to be acquired by similar institutions in the other New England states with reciprocal laws do not violate the Commerce Clause. The CIBA is authorized by the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §1842(d), which prohibits the Federal Reserve Board from approving any application by a bank holding company to acquire a bank in another state unless specifically authorized by the laws of that state.

2. Under this Court's test, the reciprocal provisions of the Connecticut and Massachusetts Interstate Banking Acts do not violate the Compact Clause because there is no interstate compact or agreement which tends to increase the power of the compacting states in a manner which interferes with federal supremacy. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978); *Virginia v. Tennessee*, 148 U.S. 503 (1893). There is no overt agreement between Con-

necticut and Massachusetts; the state Acts provide no interstate apparatus for the regulation of bank holding companies; and there can be no interference with federal supremacy because the Douglas Amendment defers to state law on the issue of interstate banking.

3. There is no conflict with any decision of this Court or any other court of appeals. Indeed, the Second Circuit's decision is in accord with the decision of the one other circuit that has addressed the question. *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), held that

> the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy.

Id. at 1297.

4. While interstate banking is not an unimportant issue of public policy, there is no *legal* issue requiring settlement by this Court. The basic legal issues related to the Commerce and Compact Clauses are familiar learning, while the petitioners' major argument—that the geographic limitations in the Connecticut and Massachusetts Acts are bad national policy—should more appropriately be addressed to Congress.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY FEDERAL COURT OF APPEALS

1. *There Is No Conflict with Any Decision of this Court.*

a. *The Commerce Clause*

In its decision that the Connecticut and Massachusetts Interstate Banking Acts are authorized by the provisions of the Douglas Amendment, the Court of Appeals applied well-recognized Commerce Clause principles.

It is axiomatic that the Commerce Clause is a grant of plenary power to Congress to regulate commerce among the states and that this grant in no way restricts the authority of Congress to regulate interstate commerce. *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 652 (1981); *Lewis v. BT Investment Managers Inc.,* 447 U.S. 27, 35 (1975); *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 434 (1946). Indeed, as this Court stated in *Prudential Insurance Co. v. Benjamin, supra,* at 434:

> The power of Congress over commerce . . . is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade.

The Douglas Amendment's total ban on bank acquisitions across state lines is a clear example of this power to discriminate in favor of local trade. Indeed, the main impetus for the

BHCA was to protect local banks and maintain the diversity of the American banking system.[6]

It is also axiomatic that, in the exercise of its plenary authority over interstate commerce, "Congress may 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 652 (citing *Lewis v. BT Investment Managers*, 447 U.S. at 44). This Court has held, however, that any such authorization must be expressly stated in federal law. *South Central Timber Development, Inc. v. Wunnicki*, ____ U.S. ____, 104 S.Ct. 2237, 2242 (1984); *New England Power Company v. New Hampshire*, 455 U.S. 331, 340-41 (1982); *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

The State of Connecticut asserts that the Douglas Amendment is a clear expression of Congressional authority for the State to determine whether and on what conditions out-of-state bank holding companies shall be allowed to acquire banks in Connecticut, and that this determination may be made on the basis of local needs and local concerns. This assertion is made on the basis of the plain language of the Douglas Amendment and the long history of federal deference to state law on the issue of banking structure.

The most striking feature of American banking is its fragmented structure. Any discussion of that structure must begin with the "dual banking system" which permits institutions to be chartered by either the states or the federal government. The state and federal systems are not totally separate, however. Over the years, the two have been tied together by a complex network of federal regulation on the state system and various deferrals to state law in the federal system. The most

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[6]*See* H.R. Rep. No. 609, 84th Cong., 1st Sess., 2, 5 (1955).

unusual point of fragmentation, however, is geographic. Unique among American industries, banks have been prevented from expanding across state lines, and in many states bank operations are limited to a single community.[7]

The unusual statutory circumstances which led to this balkanization of American banking into 50 separate banking zones are the result of choices made by Congress to defer to the states on the issue of geographic expansion by banks.

The first expression of this federal policy is contained in the McFadden Act, adopted in 1927 and amended in 1933 (12 U.S.C. §36), which limits national banks to the same branching powers as are expressly permitted to state banks under state law. The result of the McFadden Act is that banks chartered by the federal government are not allowed to operate nationally. They are locked in the same geographic compartments as their state chartered counterparts and only allowed to expand through branching in accordance with state policy. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, *reh'g. denied*, 385 U.S. 1032 (1966).

The second major piece of federal legislation which confined bank expansion to the borders of the states is the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d).

The bank holding company movement was primarily a device to avoid restrictive state branching laws (as grafted onto the federal system by the McFadden Act) which limited bank expansion. By the time Congress addressed the bank holding company movement, several bank holding companies

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[7]Glidden, *Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System?* 1980 U. Ill. L. F. 369; *Geographic Restrictions on Commercial Banking in the United States, The Report of the President*, Department of the Treasury, January 1981.

were already operating large interstate networks.[8] Congressional response to this situation produced distinctly different bills in the House and Senate.

The House version of the BHCA would have barred bank holding company acquisitions of banks across state lines entirely.[9] The Senate bill would have permitted bank holding companies to acquire banks in other states subject to state power to block them under §7 of the BHCA, 12 U.S.C. §1846.[10] Senator Douglas then offered a compromise amendment which imposed a federal bar on interstate acquisitions but permitted the states to lift it.

In urging the adoption of his amendment, Senator Douglas stated:

> [O]ur amendment will permit out of state holding companies to acquire banks in other states only to the degree that state law expressly permits them . . . .

102 Cong. Rec. 6858 (1956).

In remarking on his amendment, Senator Douglas also stated:

> [I]t is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course,

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[8]*See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 3-4 (1955).

[9]*Id.* at 3, 15.

[10]S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955). *See also* 102 Cong. Rec. 6752-55 (1956).

> under the McFadden Act, even to expand within a State.

Id. at 6860.

Finally, in responding to criticism that his amendment would make interstate expansion more difficult, Senator Douglas stated that "if State law permits, and if approved by the [Federal Reserve] Board, interstate acquisitions are possible." *Id.*

In light of the plain language of the Douglas Amendment and the long history of federal deference to state law on the issue of bank expansion, the Court of Appeals correctly applied this Court's decisions requiring a clear statement of Congressional policy to authorize state regulation free of the negative implications of the Commerce Clause.

Finally, any attempt to read the negative implications of the Commerce Clause (and its implied hostility to state economic protectionism) into the Douglas Amendment is illogical. The Douglas Amendment—a federal Act—totally blocks the interstate acquisition of banks by bank holding companies. If there is one proposition on which no one can disagree, it is that the Douglas Amendment was not passed to facilitate the free flow of commerce. There is also no indication in the Douglas Amendment (or the McFadden Act) that uniformity of regulation among the states is required in the national interest. Indeed, the intent of Congress appears to have been quite the opposite. The result is our balkanized banking system.

In short, *Congress* restricted the flow of interstate commerce, but it gave the states the power to remove the obstruction—*for the benefit of a state or states*—and not because of any national interest in the free flow of commerce. In light of the severe geographic restrictions on bank holding

company expansion imposed by Congress, it is difficult to see how it can be claimed at all that the Connecticut Act "burdens" interstate commerce. Absent action by a state, there is no such commerce. Indeed, in lifting the bar of the Douglas Amendment, no matter how slightly, the state facilitates and expands the flow of commerce.

b. *The Compact Clause*

The Court of Appeals also applied clear precedent of this Court in determining that the Connecticut and Massachusetts Acts do not violate the Compact Clause. The Compact Clause is only violated where (a) there is an interstate compact or agreement, (b) which tends to increase the power of the compacting states in a manner which interferes with federal supremacy. *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978); *Virginia v. Tennessee,* 148 U.S. 503 (1893).

In addressing this issue, we note first that the passage of reciprocal legislation in Connecticut and Massachusetts did not occur pursuant to any explicit or tacit legislative or executive agreement. Rather, it constituted the independent act of each state. The enactment of such reciprocal legislation does not automatically create a "compact." *See New York v. O'Neill,* 359 U.S. 1, 19 (1959); *Bode v. Barrett,* 344 U.S. 583, 586 (1953).

Second, even if a compact could be said to exist, it fails the second prong of the test in *United States Steel v. Multistate Tax Commission, supra.* There is no increase in the power of the compacting states in any manner which interferes with federal supremacy.

No independent commission or other administrative body is authorized by the Connecticut Act. The Act does not create

any interstate apparatus for the administration of bank holding companies nor does it commit any state to approve any particular acquisition. In this regard, it should be noted that the Connecticut and Massachusetts Acts merely lift the bar of the Douglas Amendment. Other state laws set forth the criteria under which individual mergers or acquisitions will be considered.[11]

Finally, the Court of Appeals correctly found that the Connecticut and Massachusetts Acts do not interfere with federal supremacy. As a matter of federal policy, Congress has unequivocally deferred to the states—in the Douglas Amendment and in other federal acts—regarding bank expansion. Further, although Congress allowed the states to lift the limitation on interstate acquisitions of banks by bank holding companies, the Federal Reserve Board maintains full power and authority to pass upon all such acquisitions permitted by state law. State laws cannot operate so as to permit holding companies to make acquisitions in a manner that would be inconsistent with federal standards. Thus, federal supremacy relating to the expansion of bank holding companies remains fully protected and the exercise by the states of the power given to them cannot constitute an unwarranted intrusion on that supremacy.

In sum, the Connecticut and Massachusetts Acts do not require Congressional approval under the Compact Clause because "they neither project a new presence onto the federal system not alter a state's basic sphere of authority." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Power Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976).[12]

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[11]*See e.g.*, Conn. Gen. Stat. §§36-30, 36-92, 36-93, 36-140.

[12]Petitioners appear to confuse potential impact on "federal interests" with threats to "federal supremacy." That there is a federal interest no one denies. However, "[a]bsent a threat of encroachment or interference through enhanced state power the existence of a federal interest is irrelevant." *United States Steel*, 434 U.S. at 479, n.33.

2. *There Is No Conflict with Any Federal Court of Appeals.*

There is no conflict with any other court of appeals and, in fact, the Second Circuit decision is fully in accord with the decision of the District of Columbia Circuit in *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System,* 511 F.2d 1288, *cert. denied,* 423 U.S. 875 (1975). In that case the plaintiff, an association of Iowa bankers, appealed from a decision of the Federal Reserve Board approving the acquisition of two Iowa banks by a Minnesota bank holding company under a state law which permitted the acquisition of Iowa banks by any out-of-state bank holding company that already owned at least two banks in the state. The Iowa Act was plainly designed to serve Northwest Bancorporation, the only out-of-state bank holding company that would qualify.

The Association's appeal was based, *inter alia,* on the claim that the Iowa statute was invalid because it conflicted with the intent of Congress expressed in the Douglas Amendment. The Association claimed that

> implicit in the Douglas Amendment is a prohibition against discrimination between out-of-state bank holding companies. In other words, . . . the states can only decide whether to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely.

511 F.2d at 1296.

After reviewing the Douglas Amendment and its history, the D.C. Circuit rejected the claim that the Douglas Amendment was intended to impose limitations on the power of the states. On the contrary, the court held that

> the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy. Petitioner's suggested interpretation of [the Douglas Amendment] would rob the states of this power.

Id. at 1297. The D.C. Circuit recently reaffirmed this view in *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1708 (1984).

The clear import of the *Iowa Bankers* case is that a state may partially lift the bar of the Douglas Amendment and impose conditions and limitations on the entry of out-of-state bank holding companies to serve local needs.

B. THERE IS NO IMPORTANT ISSUE REQUIRING SETTLEMENT BY THIS COURT

While regional interstate banking is not an unimportant issue, it is not an issue requiring settlement by this Court.

Congress deliberately created the balkanized, fragmented banking system which exists in the United States, and it clearly deferred to state law on the issue of interstate banking. In line with the diversified nature of American banking and this deference to state law, the states have taken various approaches to interstate banking, applying economic[13] or geographic restrictions on the entry of out-of-state bank holding companies. Only two states, Alaska and Maine, presently allow unlimited interstate banking.[14].

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[13]*See* order approving BNE/CBT merger, 70 Fed. Res. Bull. 374 (Pet. App. at A70-A71).

[14]Alaska Stat. §06.05.235; Me. Pub. Law 1983, ch. 302, §2, as amended (1984).

Before considering interstate banking in Connecticut, the Connecticut General Assembly appointed a special commission ("the Hebb Commission," Res. Conn. App. at 1a) to study the issue. In its report the Hebb Commission first noted the background against which its recommendations were made, including federal deregulation and the emergence in the financial services industry of such organizations as Sears, Merrill Lynch, Shearson/American Express and others. The Commission then stated that it believed "that the interest of both consumers and businesses in Connecticut would be well served by increasing the number of competitors and the vigor of banking competition in the state." (Res. Conn. App. at 3a-4a). But, the Commission observed:

> To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and business would not, we believe, serve our state well. Similarly, to expose our small banks to the rigors of unlimited competition from large out-of-state banking organizations . . . would not be wise.

Res. Conn. App. at 5a.

In balancing these conflicting considerations, the Commission recommended an "experiment" in interstate banking. The Commission stated that by an experiment,[15]

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[15] *See New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting): "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

> we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking.

Res. Conn. App. at 6a.

The Commission then staked out the geographic boundaries of the experiment by recommending that it be limited to the New England states. In making this recommendation, the Commission stated:

> We believe that there is a natural economic and cultural community of interest among the New England states that would make such an experiment in regional banking a reasonable first step toward interstate banking. We further believe that the legislature would be justified in excluding New York from this first phase on the ground that New York is the home state of a number of the nation's very largest banking institutions and that it is necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking before exposing our banking system to the full rigor of competition from these giant institutions.

Res. Conn. App. at 6a-7a.

Petitioners' basic argument in this case is that these parochial interests which are embodied in the Connecticut Act are bad economic policy for the nation. But, because the Connecticut Act is plainly authorized by Congress, petitioners' energies should be addressed to that body and not to this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfuly submitted,

State of Connecticut and
Brian J. Woolf, Its
Banking Commissioner

JOSEPH I. LIEBERMAN
Attorney General

ELLIOT F. GERSON
Deputy Attorney General

JOHN G. HAINES*
Assistant Attorney General

P.O. Box 120
Hartford, Connecticut 06101
Tel: (203) 566-4899

*Counsel of record

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY AND CITICORP
Petitioners

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM
Respondent

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION, THE
COMMONWEALTH OF MASSACHUSETTS, THE STATE OF
CONNECTICUT AND BANK OF BOSTON CORPORATION
Intervenor-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO THE BRIEF OF RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER, IN OPPOSITION TO PETITION

REPORT TO THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT OF THE FINDINGS AND RECOMMENDATIONS OF THE COMMISSION TO STUDY LEGISLATION TO LIMIT THE CONDUCT OF BUSINESS IN CONNECTICUT BY SUBSIDIARIES OF BANK HOLDING COMPANIES AND THE IMPACT OF NON-DEPOSITORY INSTITUTIONS ON TRADITIONAL BANKING ACTIVITIES

Edwin Gordon Hebb, Jr.
Chairman

January 5, 1983

Submitted Pursuant to Connecticut General Statutes Section 36-5b

(The "Hebb Commission Report") (Excerpt)

RECOMMENDATIONS

The Commission has given careful thought to the question whether Connecticut should be opened up to interstate banking. Under present federal law, the choice is entirely within the authority of the Connecticut legislature. Interstate branching is not presently permissible for member banks of the Federal Reserve System and nonmember banks are generally restricted to in-state branching by their own state laws. Through the so called Douglas Amendment to the Bank Holding Company Act of 1956, Congress has effectively prevented bank holding companies from acquiring additional bank subsidiaries outside their home state unless the law of the addi-

tional state explicitly permits an out-of-state bank holding company to acquire banks in that state. Thus, by taking no action at all, Connecticut can allow the prohibition of the Douglas Amendment to remain in effect and to preclude acquisitions of Connecticut banks by out-of-state banking organizations.

At the same time, it is within the authority of the Connecticut legislature to take action under the Douglas Amendment to permit out-of-state entry. Furthermore, the legislature has, in view of the Commission, a wide range of choice in fashioning a law that would permit such entry. That is, the legislature is not simply limited to a choice between retaining the Douglas Amendment barrier, on one hand, or doing away with it entirely, on the other. It may, if it so elects, condition entry into Connecticut in a way that would promote the best interests of the state of Connecticut and its citizens.

The Commission is keenly aware that issues of interstate banking are of concern to a wide range of interests in Connecticut. We have tried to take these interests into account in fashioning our recommendations. While we believe, as we set forth in more detail below, that the legislature should give favorable consideration to some form of interstate banking, we also believe that a balanced and evenhanded approach should be taken to the issue.

In the view of the Commission, the primary advantage for citizens of Connecticut in opening the state to interstate banking would be to increase competition in banking in Connecticut. While banking has historically been viewed as an industry that needs protection from excessive competition, in view of the overwhelming public interest in maintaining a sound banking system, the Commission believes that the interest of both consumers and businesses in Connecticut would be well

served by increasing the number of competitors and the vigor of banking competition in the state. The business of banking has experienced enormous innovation in recent years, and with increasing deregulation of banking at the federal level, the Commission believes that the future will also be a time of great innovation in banking. While Connecticut banking institutions have served our state extremely well, we believe that an infusion of additional competitive vigor into Connecticut would not only enhance the competitive performance of our own banks but would bring to bank customers in Connecticut the benefits of increased innovation in banking. Furthermore, the Commission believes that as our citizens become increasingly mobile, banking can no longer be viewed as an industry that is neatly segregable by state boundaries. Banking is very much an interstate business, and we must not close our eyes to the fact that banking in Connecticut is simply part of our nation's overall banking structure.

While we believe that the enhancement of competition in banking in Connecticut is the major goal to be served by any change in Connecticut law that would permit entry by out-of-state banking institutions, it must also be recognized, we believe, that the ability of Connecticut banks to compete in markets outside Connecticut may well depend upon Connecticut's attitudes toward interstate banking. Several states that have recently enacted laws to permit entry by out-of-state banking organizations have done so on the basis of reciprocity. That is, they have permitted out-of-state entry only from those states into which their own banks would be permitted reciprocal entry. If such laws become the prevading pattern for state laws relating to interstate banking, as we think they may, Connecticut may have an additional interest in modifying its laws in this regard so as to advance the interests of its own banks. It is plainly in the interests of Connecticut that Connecticut-based banks have the opportunity to grow and become stronger through geographic expansion.

At the same time, we believe that there are countervailing concerns that weigh against wholesale elimination of the Douglas Amendment prohibition. There are presently 63 savings banks, 40 commercial banks and 19 savings and loan associations in Connecticut, many of which are quite small. These banks have been devoted over the years to serving Connecticut markets and Connecticut customers, and we believe that they have been doing a good job. The shareholders of these banks are themselves, for the most part, citizens of Connecticut, whose interests, just as those of consumers of banking services in Connecticut, are entitled to consideration by our legislature.

Both at the national and state levels the philosophy underlying our structure of bank regulation has been to promote a pluralistic banking system—a system comprised of many units, rather than a highly concentrated system made up of a few large banks. The promotion of local ownership and control of banks has as one of its objectives the preservation of a close relationship between those in our communities who need credit and those who provide credit. To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and businesses would not, we believe, serve our state well. Similarly, to expose our smaller banks to the rigors of unlimited competition from large out-of-state banking organizations—particularly at a time when deregulation of banking products at the federal level is already putting strains on the resources of smaller banks—would not be wise.

In an effort to balance the various conflicting considerations that bear on the issues of interstate banking, the Commission has concluded and recommends that a legislative program embodying the following principles should be given favorable consideration:

1. An experiment in interstate banking would be desirable. By "experiment" we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking.

2. De novo entry into Connecticut by out-of-state banking organizations should not now be permitted. While we recognize that de novo expansion is generally thought to be pro-competitive, we believe it would present a potentially serious threat to the owners of Connecticut banks to permit de novo entry at this time. We recognize that if Connecticut were opened to out-of-state entry, the value of existing banks may well be enhanced. On the other hand, the ability of a large potential entrant to come in de novo may well have the effect of tipping the bargaining power in favor of the out-of-state interest. Were de novo entry to be permitted, the value of an existing franchise would be limited by some factor relating to the potential entrant's cost of de novo entry. While we do not believe that it is the purpose of our banking laws to create or preserve value for bank stockholders, we believe that the owners of existing banks have a legitimate claim, at least during a transitional period, not to have their equity devalued by a sudden change in the structural rules.

3. The range of potential entrants should be limited, at least initially, by area of origin. The Commission believes that out-of-state entry into Connecticut during the "experiment" should be restricted only to banking organizations having their principal place of banking business in another New England state. We believe that there is a natural economic and cultural community of interest among the New England states that would make

such an experiment in regional banking a reasonable first step toward interstate banking. We further believe that the legislature would be justified in excluding New York from this first phase on the ground that New York is the home state of a number of the nation's very largest banking institutions and that it is necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking before exposing our banking system to the full rigor of competition from these giant institutions.

4. Out-of-state entry should be conditioned upon reciprocity. That is, we should permit entry only from those states into which Connecticut banking organizations would be permitted reciprocal entry.

5. To enhance the competition position of Connecticut's banking institutions, we suggest the relaxation of restraints on intrastate multi-office banking.

6. The approval of the Connecticut Banking Commissioner should be required for the acquisition of any bank in Connecticut by an out-of-state bank holding company, and in considering applications for such acquisitions the Commissioner should be required to consider the effect of the acquisition on the financial and managerial resources of the acquired bank, the effect of the acquisition on competition, and the likelihood that the acquisition will serve the public interest.

* * * * *

In summary, we recommend that the legislature adopt a measure permitting banking institutions from the New England states to acquire existing banks in Connecticut, subject to the approval of the Banking Commissioner, and subject

further to the requirement that Connecticut banking organizations are permitted to enter the acquirer's state under conditions no more onerous than those imposed by Connecticut and that appropriate review of the restrictions on intrastate geographical expansion be considered.

Respectfully Submitted,

Edwin Gordon Hebb, Jr.,
Chairman

The Commission to Study
Legislation to Limit the Conduct
of Business in Connecticut by
Subsidiaries of Bank Holding
Companies

* * * * *

Commissioners Robert G. Gilligan, Clarence Gustafson and John Sponheimer are in agreement with the Report.

Commissioner Frank Coyle agrees with the Report, but takes exception to Recommendation No. 5.

Commissioner William J. Sullivan was ill and unable to participate in the findings and recommendations within the Report.

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CLERK

Nos. 84-363

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

NORTHEAST BANCORP INC.,
UNION TRUST COMPANY,
and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Respondent

AND

BANK OF NEW ENGLAND CORPORATION,
CBT CORPORATION, HARTFORD NATIONAL
CORPORATION, BANK OF BOSTON, THE
COMMONWEALTH OF MASSACHUSETTS AND
THE STATE OF CONNECTICUT
Intervenor-Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION OF INTERVENOR COMMONWEALTH OF MASSACHUSETTS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

THOMAS KILEY
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

QUESTIONS PRESENTED

1. In light of the historical policies of decentralized banking and deference to the states in matters of bank expansion, as well as the narrow practical consequences of the decision of the Second Circuit Court of Appeals to uphold Massachusetts and Connecticut statutes allowing only limited interstate banking, does this case merit plenary review?

2. Given the authority of Congress over interstate banking, does this case merit plenary review?

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STATEMENT OF THE CASE

Pursuant to the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841 et seq, the Board of Governors of the Federal Reserve System ("Board") approved three applications for the interstate acquisition of Connecticut and Massachusetts bank holding companies. In considering the applications, the Board weighed the impact of the 1982 Massachusetts Interstate Banking Act, Mass. St. 1982, c. 626 ("Massachusetts Act"),[1/] and its Connecticut counterpart, 1983 Conn. Act. 83-411 (Reg. Sess.).[2/] In its orders,

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1/ The Act is codified in Mass. Gen. Laws Ann. ch. 167, §§ 38-39, and Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1984).

2/ Those applications included: the Hartford National Corporation, a

(footnote continued)

the Board found "no clear and unequivocal basis" for determining that those statutes violate the Commerce, Compact, and Equal Protection clauses of the United States Constitution. (Pet. App. 41, 74-75, 83-84)

The Court of Appeals affirmed the decisions of the Board.[3/] The court concluded that the Massachusetts Act is authorized by the Douglas Amendment to

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(footnote continued)

Connecticut bank holding company, to acquire Arltru Bancorporation, a Massachusetts bank holding company; Bank of New England Corporation, based in Massachusetts, to merge with CBT, a Connecticut bank holding company; and Bank of Boston Corporation, also based in Massachusetts, to acquire Colonial Bancorp, Inc., of Connecticut.

3/ Massachusetts, Connecticut, and the various banking corporations involved intervened in the proceedings before the Second Circuit Court of Appeals.

the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(a)(1), which prohibits a bank holding company from acquiring any bank located outside the bank holding company's home state, unless the laws of the bank's home state expressly authorize the acquisition. The petitioners grounded their constitutional challenge to the Board's decision on the fact that the Massachusetts Act and Connecticut statute each permit only New England bank holding companies to acquire Massachusetts and Connecticut banks. The Court of Appeals found that the Douglas Amendment, as a congressional grant of authority to the states, made the Massachusetts Act and the Connecticut statute "'invulnerable' to challenge under the Commerce Clause." (Pet. App. 30-31). Moreover, the court, as the Board before it, found

no "agreement" between states which violated the Compact Clause and, even treating the statutes as a compact, they did not create a threat of encroachment upon "the just supremacy of the United States" that would violate the Compact Clause. (Pet. App. 31-32).

REASONS FOR DENYING THE WRIT

The Joint Brief In Opposition filed by the intervenor-respondent banking corporations describes in detail the procedural background and statutory framework for this petition. That Joint Brief includes a lengthy discussion of the case law, statutory authority, and legislative history, which demonstrates that the Massachusetts Act and its Connecticut counterpart do not violate the Constitution. Analysis under standard principles

of statutory interpretation demonstrates that Congress, in enacting the Douglas Amendment, explicitly authorized the actions taken by the Commonwealth and Connecticut. The Commonwealth will not reiterate those arguments here, as it concurs with and relies upon the legal analysis contained in the Joint Brief. Instead the Commonwealth will demonstrate that, in the context of this nation's interstate banking policies, practices and the historical regulatory role played by states, this case does not merit review by this Court.

I. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH LONG-STANDING CONGRESSIONAL POLICY AND DOES NOT MERIT REVIEW.

A. This Case Will Not Have Significant Practical Consequences In The Regulation Of Bank Expansion.

Petitioners assert that the Second Circuit's decision will cause a chain of events to occur that will ultimately subject the "nation's banking system to substantial confusion and mischief." (Pet. 13) Petitioners paint a picture of a legally and economically homogeneous federal system, within which the Massachusetts Act and the Connecticut statute will "pit state against state" and bring about "artificial divisions and unintended fragmentation." (Pet. 12, 13). This portrait, however, does not accurately portray the reality of contempo-

rary banking which is already subject to state and local control, nor does it accurately describe the relatively slight changes that may result when states allow interstate banking under the Douglas Amendment, as Massachusetts has done.

Regardless of the outcome of this case, the states will continue to have considerable authority in regulating banks and banking expansion. Reversal of the Second Circuit's decision would still leave the states with the authority to prohibit interstate banking. Contrary to the unified federal system depicted by petitioners, bank regulation has always been, and will remain, a state-by-state regulatory quilt.

While bank policy remains important to both Congress and the states, this case has much less practical importance

than petitioners claim for the decision will not have major new economic and regulatory consequences. Furthermore, whatever consequences do flow from the Second Circuit's decision will remain under the scrutiny of and subject to the control of Congress. Given the relatively tame consequences of this case and the ability and power of the Congress to control bank policy if it concludes that those consequences are not desirable, this case does not merit plenary review.

B. States Have Historically Had Considerable Authority Over Bank Expansion.

"There has long been opposition to the exercise of federal power in the banking field." First National Bank of

Logan v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966). This opposition stems, at least in part, from a concern with an excessive concentration of economic power in large financial institutions. Geographic Restrictions on Commercial Banking -The Report of the President, Department of the Treasury at 1 (1981) (hereinafter "1981 Report"); See generally, A. Schlesinger, Jr., The Age of Jackson. One area of considerable concern has been the abilities of banks to expand geographically, since one obvious way to grow is to expand the areas and population served by a bank. Expansion, however, may make banks less sensitive to the needs of the local communities which originally spawned the banks.

Consequently, the United States banking industry has long been fragmented, with a decentralized structure and local control over banking. 1981 Report at 1. A dual system exists in which the federal government and the states each charter banking institutions. A complex network of federal regulation influences the state system, while simultaneously various important deferrals to the states occur within the federal scheme. Almost uniformly, the states have prohibited banks from expanding across state borders by preventing out-of-state banks from opening in-state branches and, indeed, many states prohibit or seriously limit branch banking by in-state banks. 1981 Report; Scott, The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1 (1977).

Congress initially expressed its intent to defer to the states on the issue of geographic expansion by banks in the McFadden Act, 12 U.S.C. § 36, adopted in 1927 and amended in 1933, which provides that national banks have the same authority to establish branch as do state banks under the pertinent state law. The McFadden Act resulted, in part, from congressional opposition to the branching principle because it threatened small, independent banks. See S. Rep. No. 666, 68th Cong. 1st Sess. (1924); 67 Cong. Rec. 3,226-33, 1,394-97, 11,766-79 (1926); 68 Cong. Rec. 3,576-78, 5,812 (1927); Glidden, Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Bank System?, 1980 U. Ill. L.F. 369, 377.

Under the McFadden Act, even banks chartered by the federal government could not operate nationally -- national banks remained confined in the same geographic compartments as state banks, able to expand by branching only in accordance with state policy. First National Bank of Logan, 385 U.S. at 260. With the approval of Congress, the states adopted a broad spectrum of branch banking statutes, reflecting local views of appropriate banking policy, ranging from statewide branching to a total ban on branching. Glidden, 377.

In response to the narrow state branching laws imposed on national banks through the McFadden Act, bank holding companies evolved in order to evade the

restrictive statutes.[4/] Id. at 380. As a result, Congress reacted to this phenomenon by passing the Bank Holding Company Act of 1956 ("the BHCA"), 12 U.S.C. §§ 1841 et seq., including the Douglas Amendment at issue here. The BHCA "was designed to prevent the concentration of banking resources in the hands of a few financial giants" and "was intended to implement a congressional policy against control of banking and non-banking enterprises by a single business entity." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 46 (1980). Viewed in this light, the Douglas Amend-

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4/ Holding companies began to acquire banks in different states to avoid the McFadden Act and state branching limitations; since the banks themselves did not open new offices, branching laws did not apply. Glidden, 380-382.

ment is but another expression of congressional deference to the states; it prohibits the Board from approving any interstate acquisition of a bank by a bank holding company unless the state in which the bank is located has passed a statute expressly authorizing the acquisition.

The petitioners and the private intervenors have discussed the legislative history of the Douglas Amendment in detail. Whatever else may be said of the Douglas Amendment, the Commonwealth submits that undoubtedly it reflects a continuing congressional intent to provide the states with authority to establish policy concerning the geographic expansion of banks.

Banking, therefore, has never operated under the unified federal economic umbrella that the petitioners seek to

raise for protection. The banking industry has a history of deliberate fragmentation, with overlapping yet distinct regulatory authorities and considerable state autonomy.

The Commonwealth has its own long-settled policy of careful regulation of the Massachusetts banking industry. Its statutes distinguish among banking corporations and provide the different categories of banks with a variety of powers, including, among others, the power to receive deposits, the power to lend money, and the power to invest in different kinds of securities. See., e.g., Mass. Gen. Laws Ann. ch. 167, §§ 51, 51A; Mass. Gen. Laws Ann. ch. 167D, § 2; Mass. Gen. Laws Ann. ch. 168, §§ 54, 55; Mass. Gen. Laws Ann. ch. 170, §§ 22, 25, 26 (West 1984). The Massachusetts Legis-

lature has also enacted a number of provisions which carefully limit the powers and authorities of those corporations. See, e.g., Mass. Gen. Laws Ann. ch. 167D, § 3; Mass. Gen. Laws Ann. ch. 168, §§ 31, 31A; Mass. Gen. Laws Ann. ch. 171, §§ 13, 21 (West 1984).

In consonance with this historical control over banking, until 1982 the Commonwealth totally prohibited banks located outside Massachusetts from merging with Massachusetts banks or setting up branches in Massachusetts. The 1982 statute challenged here is merely a small, tentative step beyond the traditional insulation of the Massachusetts banking industry and toward the open, nationally uniform system to which the petitioners aspire. It opens the Commonwealth only to the relatively small

group of banks located in the other New England states. This cautious venture into interstate banking reflects the Massachusetts Legislature's continuing interest in retaining control over bank expansion, an interest consistent with the Supreme Court's recognition that banking is "of profound local concern." Lewis, 447 U.S. at 38.

The Commonwealth's control over banking expansion, though, has distinct limits. Just as banking institutions altered their forms to avoid the reach of the McFadden Act and state laws, they have maneuvered to avoid the restraints imposed by the BHCA, the Douglas Amendment, and state laws. Since 1956, numerous banks and financial institutions have expanded rapidly into interstate commerce in a wide variety of incarnations. This

growth of hybrid financial institutions and of banks providing new and different commercial services has led states to become even more vigilant in patrolling the boundaries still protected.

The petitioner Citicorp has already grown lengthy interstate banking and financing tentacles from its New York base.[5/] The BCHA defines a "bank" as an institution organized under federal or state law which both accepts demand deposits and engages in the business of

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5/ Perhaps the most telling evidence of this growth lies in the 20 page list of subsidiaries and affiliates, excluding wholly owned subsidiaries, filed by Citicorp under Supreme Court Rule 28.1. Many of those entities listed clearly operate in foreign countries, but many also appear to be operating in the United States.

making commercial loans. 12 U.S.C. § 1841(c). Thus the Commonwealth may not prevent out-of-state bank holding companies, including Citicorp, from establishing commercial loan offices, consumer finance companies, and mortgage companies in Massachusetts, or from providing numerous other financial services.[6/] While Massachusetts has prevented the expansion of traditional banks across its state lines, financial entities have crossed with impunity by altering their forms and functions.

6/ Contrary to the petitioner's claims, (Pet. 27, n. 43), the Garn-St. Germain Act of 1982 allows federally assisted failing-bank acquisitions by out-of-state bank holding companies, specifically excluding failing-bank acquisitions from the reach of the Douglas Amendment. See 12 U.S.C. § 1823(f)(4)(i).

The Act therefore represents simply another regulatory measure taken within a context of historical policies and long-established legal principles that give deference to states in determining the growth of banking institutions. Simultaneously, petitioners have great leeway to expand their services beyond state boundaries by tailoring their banking entities in garb that shields them from the BHCA proscriptions. While bank policy is of moment to the Commonwealth and the nation, this case will not have the serious repercussions claimed by petitioners.

C. Congress Has Authority to Approve or Disapprove The Consequences Of The Decision Of The Court Of Appeals.

Any events that do follow from the Second Circuit's decisions will occur under the full view of Congress. If the

banking industry perceives radical changes resulting from the Second Circuit's decision, Congress will either approve or disapprove of those changes. Approval or disapproval, though, should result from a policy assessment of how banking expansion should proceed, a task best left to Congress.

Resolution of this case centers on a determination of the scope of the Douglas Amendment, enacted almost thirty years ago. If Congress disapproves of the Board's and the Second Circuit's interpretation of the Douglas Amendment, it may legislate the interstate banking boundaries it deems proper. This Court, however, should leave to Congress the policy decision of what, if any, revisions are appropriate in the laws governing interstate banking in light of

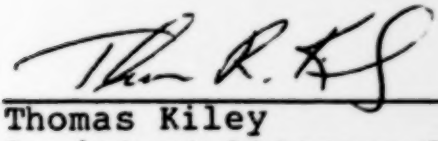
the events that have occured and institutions that have arisen since enactment of the BHCA.

CONCLUSION

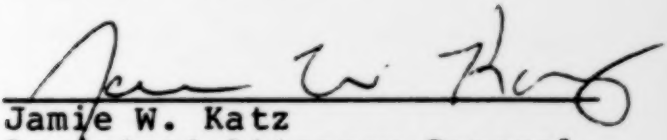
For reasons stated above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



Thomas Kiley
Assistant Attorney General
Counsel of Record



Jamie W. Katz
Assistant Attorney General
Government Bureau
One Ashburton Place,
Room 2019
Boston, MA 02108
617-727-1033

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—against—

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Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTION OF INTERVENOR-RESPONDENTS HARTFORD NATIONAL CORPORATION, CBT CORPORATION AND BANK OF NEW ENGLAND CORPORATION TO THE MOTION OF THE CHASE MANHATTAN CORPORATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

DOUGLAS M. KRAUS*
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 371-6000

Counsel for Intervenor-Respondent Hartford National Corporation

BERTRAM M. KANTOR*
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Intervenor-Respondent CBT Corporation

(Counsel continued on inside front cover)

BEST AVAILABLE COPY

WILMOT T. POPE*
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
(617) 227-5020

Counsel for Intervenor-Respondent Bank of New England Corporation

* Counsel of Record

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Intervenor-Respondents Hartford National Corporation ("HNC"), CBT Corporation ("CBT") and Bank of New England Corporation ("BNE") (collectively, "Respondents") respectfully submit this objection to the motion of The Chase

Manhattan Corporation ("Chase") pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari in the above-captioned proceeding.

Argument

In support of its motion, Chase represents that it "has been unable to obtain the consent of all intervenor-respondents to the filing of the attached brief *amicus curiae*." Mo. ¶ 1. In fact, prior to filing the instant motion, Respondents each *refused* Chase's request for written consent to the filing of such a brief.

Under the Rules of this Court, when the consent of a party to a proceeding has been refused, a motion for leave to file a brief *amicus curiae* prior to the Court's consideration of the petition for a writ of certiorari "is not favored."[1] In such circumstances, the motion must:

> set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties. . . .[2]

Because it is clear from its own papers that Chase's participation in this proceeding will merely duplicate that of petitioner Citicorp, Chase has not and cannot satisfy this Court's prerequisite for filing an *amicus* brief in support of a petition for writ of certiorari.

Chase is in precisely the same posture in this action as petitioner Citicorp (*see* Pet. at 3): it is a New York bank holding company operating through non-bank subsidiaries in Connecticut and Massachusetts; and it claims that the decision below of the United States Court of Appeals for the Second Circuit (upholding statutes enacted by Massachusetts and Con-

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1 Rule 36.1, Rules of the Supreme Court of the United States.

2 *Id.*, Rule 36.3.

necticut that permit acquisitions of banks in those states by *New England* bank holding companies) will adversely affect its ability "to compete on equal terms in New England's full-service banking market." Mo. ¶ 3. Nowhere does Chase even attempt to explain why its interest will not adequately be represented in this Court by petitioners. Nor could any such claim plausibly be made. To the contrary, petitioner Citicorp has vigorously asserted before the Federal Reserve Board, the Second Circuit and in this Court the identical interest Chase now seeks to assert in this case. Indeed, Chase chose *not* to participate in any of the extensive prior proceedings in this case, although it was free to do so,[3] leaving its interest to be represented by petitioner Citicorp.

Chase also has failed to identify a single argument of substance that it would assert in this proceeding that has not already been fully presented by petitioners. Chase's arguments in its proposed brief in support of a writ of certiorari are simply a restatement of those made in the petition.[4] Under these circumstances, Chase's participation at this point in the case is unwarranted and will serve only to increase unnecessarily the burden of this Court.

Conclusion

For the foregoing reasons, the motion of The Chase Manhattan Corporation for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari should be denied.

Respectfully submitted,

---

3 *See* 12 U.S.C. §§ 1848, 1850.

4 Both Chase and petitioners argue that a writ of certiorari should issue because this case purportedly raises questions of far-reaching importance to the nation's banking system and because the challenged statutes purportedly violate the Commerce and Compact Clauses. *Compare* Chase Br. at 6-9, 11-19, *with* Pet. at 9-29.

DOUGLAS M. KRAUS*
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 371-6000

Counsel for Intervenor-Respondent Hartford National Corporation

BERTRAM M. KANTOR*
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Intervenor-Respondent CBT Corporation

WILMOT T. POPE*
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
(617) 227-5020

Counsel for Intervenor-Respondent Bank of New England Corporation

* Counsel of Record

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WILMOT T. POPE*
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
(617) 227-5020

Counsel for Intervenor-Respondent Bank of New England Corporation

Of Counsel:

LAURENCE H. TRIBE
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

BERTRAM M. KANTOR*
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS*
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 371-6000

Counsel for Intervenor-Respondent Hartford National Corporation

**Counsel of Record*

39 pp

QUESTIONS PRESENTED

When Congress enacted Section 3(d) of the Bank Holding Company Act of 1956 (commonly known as the "Douglas Amendment") it imposed a federal prohibition against interstate bank acquisitions by out-of-state bank holding companies, and at the same time authorized the states, if they wished, to lift this federal bar—as Senator Douglas stated—"to the degree" that they deemed desirable. In the words of a co-sponsor of the Douglas Amendment, Congress thereby deemed interstate bank acquisitions to be "a matter of primary concern to state governments" and "an area best left to their discretion."

In 1982, Massachusetts enacted a statute pursuant to the Douglas Amendment which permits an out-of-state bank holding company located in any New England state to acquire a bank located in Massachusetts if the acquiror's home state has adopted reciprocal legislation permitting bank acquisitions by Massachusetts bank holding companies. In 1983, Connecticut enacted a similar statute. Thereafter, the Board of Governors of the Federal Reserve System approved, over petitioners' constitutional objections, three applications concerning interstate transactions involving Massachusetts and Connecticut banking organizations. The Second Circuit, in affirming the Board's approval orders, rejected petitioners' constitutional challenges to the Massachusetts and Connecticut Acts.

The issue in this case is *not*—as petitioners claim—whether Congress intended to permit the states to "balkanize" the nation's banking system. Congress itself, by enacting the Douglas Amendment over 28 years ago, effectively partitioned the nation's banking system along state lines. Rather, the questions presented in this case are:

1. Whether state legislation may be challenged based upon purported discrimination against interstate commerce, encroachment upon federal supremacy and "balkanization" of the nation's banking system where Congress, in the Douglas Amendment, prohibited *all* interstate bank acquisitions and, in

order to render state policy determinations paramount, authorized the states to determine for themselves whether and to what degree to permit such acquisitions?

2. Whether the Massachusetts and Connecticut Acts impermissibly restrain interstate commerce where Congress, in the Douglas Amendment, authorized the states to be selective in determining which out-of-state bank holding companies may acquire in-state banks?

3. Whether the Massachusetts and Connecticut Acts improperly encroach upon federal supremacy in violation of the Compact Clause where Congress, in the Douglas Amendment, chose to defer to potentially disparate state policy determinations in the area of interstate bank acquisitions?

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Respondents CBT Corporation, Bank of New England Corporation and Hartford National Corporation, all of which were intervenors in the court below, submit this brief in opposition to the petition for certiorari filed by Northeast

Bancorp, Inc., Union Trust Company and Citicorp (collectively, "petitioners") in this matter.[1]

STATEMENT OF THE CASE

a. *The Federal Statutory Context.* One of Congress' central purposes in enacting the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"), was to regulate the interstate expansion of bank holding companies.[2] In confronting this problem, Congress considered three alternative approaches, including that which was ultimately enacted as Section 3(d) of the BHC Act—commonly referred to as the "Douglas Amendment," after its sponsor Senator Paul Douglas of Illinois.

The House of Representatives passed a version of the BHC Act, H.R. 6227, that contained an absolute prohibition on interstate bank acquisitions by bank holding companies, prompted by the concerns of many Representatives about big business and their desire that banking remain a community-oriented industry consisting of localized "democratic grass-roots institution[s]."[3] This concern was not shared by a majority of the Senate Committee on Banking and Currency; it reported out a bill that permitted interstate bank acquisitions, subject only to approval by the Federal Reserve Board.[4] When

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1 A statement concerning the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of CBT Corporation, Bank of New England Corporation and Hartford National Corporation appears in the Appendix to this brief.

2 By 1956, a number of holding companies had already established large interstate networks by acquiring banks located outside their home states. *E.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-5, 15 (1955); 102 Cong. Rec. 6858 (1956) (remarks of Senator Douglas).

3 H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2, 5-7 (1955); *accord* 101 Cong. Rec. 4407 (Remarks of Rep. Wier), 3823 (Speech of Rep. Rayburn submitted for the Record by Rep. Spence), 8028-29 (Remarks of Rep. Patman), 8030-31 (Remarks of Rep. Rains), 8033 (Remarks of Rep. O'Hara), 8034 (Remarks of Rep. Marshall) (1955).

4 S. Rep. No. 1095, Pt. 1, 84th Cong., 1st Sess. 10-11 (1955). The Board of Governors of the Federal Reserve System is referred to herein as the "Federal Reserve Board" or the "Board."

that bill reached the Senate floor, its proponents argued that it was preferable to the House bill which, because it totally prohibited interstate banking, was said to represent "an unwarranted interference with States' rights."[5]

The dispute was resolved by Senator Douglas' compromise. The Douglas Amendment prohibits the Federal Reserve Board from approving the acquisition by a bank holding company located in one state of a bank located in another state unless such acquisition is "specifically authorized by the statute laws of the state in which such bank is located by language to that effect and not merely by implication."[6] As this Court has observed, the Douglas Amendment "establishes a general federal prohibition on the acquisition" of in-state banks by out-of-state bank holding companies. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980). The Douglas Amendment also authorizes the states "to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Id.* (emphasis in original). Thus, Congress in the Douglas Amendment empowered the states to lift the federal prohibition on interstate bank acquisitions to the extent that they desired to do so.[7]

b. *Subsequent Developments.* At the time of passage of the BHC Act and for many years thereafter, no state permitted its banks to be acquired by out-of-state bank holding companies. The practical effect of the Douglas Amendment thus was to divide the nation into separate banking regions defined by state boundaries. During the last 15 years, however, many large banking institutions have established an interstate presence through various means that avoid the constraints imposed upon banking activities by the Douglas Amendment and other

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5 102 Cong. Rec. 6752 (1956) (remarks of Senator Robertson, floor manager for the Senate Committee's bill, *quoting* Senator Maybank).

6 12 U.S.C. § 1842(d)(1).

7 A further discussion of the legislative history of the Douglas Amendment appears at pp. 11-14, *infra*.

federal and state statutes.[8] Many large bank holding companies now serve commercial customers nationwide through out-of-state offices that offer commercial financing, leasing, factoring, cash management and international banking services. Many large bank holding companies also pursue retail banking business across state lines through ownership of consumer finance companies, as well as the use of credit cards, mail solicitation of deposits and interstate networks of automatic teller machines.[9] Petitioner Citicorp has been on the cutting edge of these changes through its establishment of interstate credit card and other special purpose banks, its acquisition of large savings and loan institutions in California, Illinois and Florida, and a number of other programs.

As *de facto* interstate banking has developed, within the last decade a total of 22 states have moved toward *de jure* interstate banking by enacting laws that create a variety of exceptions to the Douglas Amendment's prohibition of interstate bank acquisitions. Only one of these states—Maine—permits virtually unlimited entry by out-of-state bank holding companies.[10] Other states have partially lifted the federal bar in various ways. Alaska permits acquisitions of existing banks by out-of-state bank holding companies, but does not permit the acquisition of banks formed after a specified date.[11] New York

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8 Under the BHC Act, a "bank" is an institution that both makes commercial loans and accepts demand deposits. 12 U.S.C. § 1841(c) (1982). This Court has held that the Douglas Amendment's general prohibition applies only to interstate *bank* acquisitions, and not to the *non-bank* activities of bank holding companies. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 47.

9 On November 1, the Comptroller of the Currency approved applications by 13 bank holding companies, including petitioner Citicorp, to establish a total of 29 so-called "nonbank" or "consumer" banks. The American Banker, November 2, 1984, at 1. Because such institutions either do not make commercial loans or do not accept demand deposits, they arguably fall outside the definition of a "bank" contained in the BHC Act. See n.8, *supra*.

10 Me. Pub. Law 1983, ch. 302, § 2, as amended (1984).

11 Alaska Stat. § 06.05.235 (1982).

limits entry to bank holding companies whose home states permit acquisitions by New York holding companies.[12] Nine states, including Connecticut and Massachusetts, permit interstate bank acquisitions by banking institutions located within a particular region.[13] Three states limit acquisitions to "grandfathered" out-of-state holding companies which had acquired in-state banks prior to enactment of the BHC Act.[14] Six states limit entry by out-of-state bank holding companies to the establishment of special purpose banks which are prohibited from or restricted in competing with in-state banks.[15] Finally, two states—Oregon and Washington—permit out-of-state bank holding companies to acquire only "failing banks."[16]

c. *The Challenged Statutes.* The Massachusetts statute, enacted in December 1982, authorizes bank holding companies based in any of the other five New England states—Connecticut, Maine, New Hampshire, Rhode Island and Vermont—to acquire Massachusetts banking organizations, provided that the home state of the acquiror affords reciprocity to Massa-

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12 N.Y. Banking Law § 142-b (McKinney Supp. 1983).

13 In addition to Connecticut and Massachusetts, only one other New England state—Rhode Island—permits acquisitions by New England bank holding companies, although the New England-only feature of the Rhode Island statute expires after two years. R.I. Gen. Laws §§ 19-30-1, 19-30-2 (1983). Six other states have enacted regional reciprocal statutes which limit entry to out-of-state bank holding companies located in other areas. Fla. Stat. Ann. § 658.295 *et seq.*; Ga. Code § 7-1-620 *et seq.*; Act of February 3, 1984, ch. 287, *to be reported as* 1984 Ky. Rev. Stat. § 287-900 *et seq.*; N.C. Gen. Stat. § 53-209 *et seq.*; S.C. Laws tit. 34, ch. 24, 25; 1984 Utah Code Ann. 7-1-102, 7-1-702.

14 Fla. Stat. Ann. § 658.29 (West. Supp. 1983); Ill. Ann. Stat. ch. 17, § 2510 (Smith-Hurd 1981); Iowa Code Ann. § 524.1805 (West Supp. 1982-83).

15 Del. Code Ann. tit. 5, § 801 *et seq.* (Supp. 1982); Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1983); 1983 Nebraska Laws L.B. Nos. 454 and 58; Nev. Rev. Stat. ch. 666; S.D. Codified Laws § 51-16-41 (1983); Va. Code § 6.1-392 (1983). Also see p. 16 & nn.41 & 42, *infra*.

16 1983 Or. Laws ch. 367; 1983 Wash. Laws ch. 157. The Oregon statute limits acquisitions to holding companies from contiguous states.

chusetts banking organizations.[17] In June 1983, Connecticut passed a similar statute.[18]

Neither state permitted interstate bank acquisitions by bank holding companies prior to the passage of these laws. The challenged statutes thus operate to *permit* interstate commerce between Connecticut and Massachusetts, and potentially among as many as six New England states, where previously such commerce had been prohibited by the Douglas Amendment.

Neither the Massachusetts Act nor the Connecticut Act alters the Douglas Amendment's prohibition on interstate bank acquisitions by bank holding companies based outside New England. Such acquisitions continue to be barred not by *state* law, but rather by the federal prohibition contained in the Douglas Amendment.

d. *The Relevant Transactions and Board Proceedings.* After passage of the Connecticut and Massachusetts Acts, Bank of New England Corporation, based in Massachusetts, agreed to merge with CBT Corporation, a Connecticut bank holding company; Hartford National Corporation, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, a Massachusetts bank holding company; and Bank of Boston Corporation of Massachusetts agreed to acquire Connecticut-based Colonial Bancorp, Inc.

Applications for approval of these transactions were submitted to the Federal Reserve Board. In extensive comments in opposition to the applications,[19] petitioners did not deny that the Connecticut and Massachusetts Acts permitted interstate commerce that the Douglas Amendment otherwise would have

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17 Mass. Ann. Laws ch. 167A § 2 (West Supp. 1982) ("the Massachusetts Act") (Pet. App. A101-A102).

18 1983 Conn. Acts, Pub. Act No. 83-411 (Reg. Sess.) ("the Connecticut Act") (Pet. App. A99).

19 Petitioner Citicorp opposed all three applications. Petitioners Northeast Bancorp, Inc. and Union Trust Company did not oppose Hartford National Corporation's acquisition of Arltru Bancorporation or Bank of Boston Corporation's acquisition of Colonial Bancorp, Inc.

prohibited as a matter of federal law. Nonetheless, petitioners contended that the Massachusetts and Connecticut Acts violated the Commerce,[20] Compact,[21] Equal Protection and Due Process Clauses[22] of the Constitution.

The Board, in approving the transactions, concluded that the Connecticut and Massachusetts Acts provided the specific state statutory authorization required by the Douglas Amendment (Pet. App. A37, A74, A83), and found no adequate basis to declare the Acts unconstitutional (Pet. App. A38-A41, A49-A71, A74-A75, A83). Although the Board questioned whether the challenged statutes could be sustained under the Commerce Clause absent the authority conferred on the states in the Douglas Amendment (Pet. App. A55-A61), after a lengthy review of the language, history and prior interpretations of the Amendment (Pet. App. A61-A71), the Board concluded that "[n]othing in the history of the . . . Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry" (Pet. App. A71). The Board thus recognized that Congress in the Douglas Amendment authorized the states to pursue their own policies and to allow interstate bank acquisitions on a selective basis.

As for the Compact Clause, the Board viewed the challenged statutes as "part of an effort to create a regional banking zone," but it did *not* find that the New England states had entered into any actual agreement or confederation (Pet. App. A51-A52).[23] The Board recognized that, even if the statutes

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20 U.S. Const. art. I, § 8, cl. 3.

21 U.S. Const. art. I, § 10, cl. 3.

22 U.S. Const. amend. XIV, § 1.

23 Indeed, a "New England" agreement could not reasonably have been found in light of the widely divergent approaches to interstate bank acquisitions adopted by the six New England states. Only two other New England states permit interstate bank acquisitions: Maine permits virtually unlimited entry while Rhode Island has enacted a statute reciprocal with the Massachusetts and Connecticut statutes, the New England-only feature of which expires after two years. See nn. 10 & 13, *supra*. New Hampshire and Vermont have not enacted interstate bank acquisition statutes; there, the Douglas Amendment prohibits all interstate bank acquisitons.

were to be considered part of an "implicit" compact or agreement, they would violate the Compact Clause only if they "enhance[d] state powers *at the expense of federal supremacy*" (Pet. App. A52 (emphasis added)). The Board found, based on its detailed analysis of the Douglas Amendment's history and prior administrative and judicial construction (Pet. App. A65-A71), that the Amendment constitutes "*a renunciation of federal interest* in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52 (emphasis added)). The Board therefore rejected petitioners' Compact Clause challenges.[24]

e. *The Decision Below.* Petitioners sought review of the Board's orders in the United States Court of Appeals for the Second Circuit. The Court of Appeals unanimously affirmed, rejecting all of petitioners' constitutional objections. (Pet. App. A21-A33).

The Second Circuit began its analysis with the Douglas Amendment. The Court of Appeals recognized that Senator Douglas had stated that the purpose of his amendment was to " 'permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them,' " and that " 'the amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided' " (Pet. App. A28-A29, *quoting* 102 Cong. Rec. 6858, 6860 (1956)).

The Court of Appeals observed that under the Douglas Amendment, *no* out-of-state bank holding company could acquire a Massachusetts or Connecticut bank absent the challenged statutes. It concluded that because the Connecticut and Massachusetts Acts permitted interstate bank acquisitions that otherwise would be prohibited under federal law, the Acts

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24 The Board also concluded that the Massachusetts and Connecticut Acts—which "involve essentially economic legislation and do not raise issues of fundamental rights or draw upon suspect classifications"—were "rationally related to an attempt to maintain a banking system responsive to local needs in New England." (Pet. App. A54). The Board therefore found petitioners' Equal Protection argument to be without merit. (Pet. App. A55). The Board apparently found petitioners' claims under the Due Process Clause to be too insubstantial to require comment.

promote, rather than restrict, interstate commerce. (Pet. App. A29). The Second Circuit found no support whatsoever for petitioners' claims that Congress had intended to restrict the states' authority to lift in a selective manner the general federal prohibition on interstate bank acquisitions imposed by the Douglas Amendment (Pet. App. A29).

Having recognized that the Douglas Amendment had effected, with respect to banking, a profound departure from the notion of a single national economic unit, the Court of Appeals had no difficulty in disposing of petitioners' constitutional claims. The Second Circuit held that, while the ability of states to interfere with interstate commerce ordinarily is limited by the Commerce Clause, "if Congress authorizes the states to regulate some aspect of interstate commerce"—as Congress has clearly done in the Douglas Amendment—"any action taken by a state within that authority is 'invulnerable' to challenge" (Pet. App. A30-A31, *quoting Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-53 (1981)). As for the Compact Clause, the Court of Appeals—like the Board—found no actual agreement or confederation of states. It concluded that, even if the Acts were "treated as a compact," there is no threat of encroachment upon "the just supremacy of the United States" that would violate the Compact Clause (Pet. App. A31-A32). In this regard, the Second Circuit noted the Board's conclusion that the Douglas Amendment constitutes "a 'renunciation of federal interest in regulating interstate acquisitions of banks by bank holding companies' " (Pet. App. A29).[25]

REASONS FOR DENYING THE WRIT

Petitioners claim that the Connecticut and Massachusetts Acts raise important issues of federal policy with respect to interstate banking (*e.g.*, Pet. 9-15). No doubt they do. However, the policy questions raised by petitioners relate to the desirability of disparate state approaches to interstate bank

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25 Finally, the Second Circuit, in rejecting petitioners' claims under the Equal Protection Clause, found the Acts to be rationally related to the legitimate interests of Massachusetts and Connecticut in fostering strong, locally-oriented banking institutions within those states. (Pet. App. at A33).

acquisitions (Pet. 11, 13, 14)—a matter that was resolved by Congress 28 years ago when it enacted the Douglas Amendment. In any event, the essential consideration here is not whether the Acts pose important *policy questions* for Congress, but whether the *legal issues* of statutory and constitutional interpretation raised by petitioners are sufficiently significant to warrant this Court's review. Those legal issues are anything but novel or unsettled. This matter presents a question of statutory interpretation regarding the Douglas Amendment as to which there is no conflict among the courts or between judicial and administrative precedents.

In the Douglas Amendment, Congress eliminated *all* interstate commerce in bank acquisitions as a matter of federal law. Thus, petitioners' repeated assertions to the contrary notwithstanding (*e.g.*, Pet. 9, 16), *Congress*—not the states—"balkanized" the nation for purposes of interstate banking. Congress also authorized the states to lift the federally-imposed barrier to interstate bank acquisitions, as stated by Senator Douglas himself, "to the degree" that they choose. The "expansion of bank holding companies across state lines" was considered—in the words of a co-sponsor of the Amendment—to be a "matter of primary concern to State governments" and "an area best left to their discretion" (see pp. 13, 14, *infra*).

That Congress intended in the Douglas Amendment to allow the states to exercise selectively the federally-granted power to lift the federal barrier to interstate bank acquisitions is supported by a long line of decisions of the Federal Reserve Board and the courts. Petitioners have pointed to no contrary precedents, nor do any exist.

Against the background of the Douglas Amendment, the illusory nature of petitioners' constitutional claims is apparent. Under this Court's established precedents, there is no violation of the Commerce Clause where, as in the Douglas Amendment, Congress has expressly authorized the states to regulate a particular aspect of interstate commerce. Nor is there any conceivable encroachment on federal supremacy in violation of the Compact Clause, where, as in the Douglas Amendment,

Congress has explicitly chosen to defer to state policies. In short, the decision below is wholly consistent with this Court's prior precedents under both the Commerce Clause and the Compact Clause.

Congress' power to regulate in an area of interstate concern by establishing state policy determinations as the norm, rather than the exception, is beyond dispute. Arguments that a different approach from that created under the Douglas Amendment would be preferable should be addressed to Congress, not the judiciary. Under the law as it presently exists, the *legal issues* sought to be raised by petitioners do *not* present questions of statutory or constitutional construction that call for review by this Court.

I. Congress In The Douglas Amendment Has Determined That The States Should Choose For Themselves Whether And To What Degree The Federal Bar To Interstate Bank Acquisitions Should Be Lifted.

Petitioners challenge the Massachusetts and Connecticut Acts as divisive state action that threatens to "balkanize" the nation's banking system and to enshrine inconsistent state policies. Petitioners' premise—that the national interest is best served by a single national banking unit and a "uniform approach to interstate banking" (Pet. 25)—is fundamentally at odds with the policy judgment made by Congress in the Douglas Amendment.

1. One of Congress' purposes in the Douglas Amendment was to establish a federal prohibition on interstate bank acquisitions, subject to a state's determination to lift the federal barrier.[26] Senator Douglas explained that, because no state then had enacted a statute authorizing interstate bank acquisitions, "the immediate practical effect" of his Amendment would be "to bar expansion of bank holding companies across state

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26 Because the Douglas Amendment was added to the BHC Act on the Senate floor, its legislative history consists entirely of floor discussion, principally by its chief sponsor, Senator Douglas of Illinois. A further discussion of that legislative history appears at pp. 2-3, *supra*.

lines," unless the states, in their discretion, chose to enact legislation to lift this bar.[27]

Thus, petitioners' complaint that the Massachusetts and Connecticut Acts raise the spectre of "balkanization" of banking is misdirected. Congress in the Douglas Amendment—not Massachusetts or Connecticut—divided the nation's banking system along state lines. The Massachusetts and Connecticut Acts merely exercise the authority conferred by the Douglas Amendment to remove the federal barrier to the degree that those states deemed desirable.

2. Petitioners contend that Congress, in enacting the Douglas Amendment, was not concerned "with any state action" that might be taken to remove the federal prohibition on interstate bank acquisitions (Pet. 17). However, the language and the legislative history of the Amendment provide clear proof that Congress did not intend to limit the states' policy choices in deciding whether, or to what extent, to remove the federal barrier.

In presenting his Amendment to the Senate, Senator Douglas carefully explained that, although no state at that time authorized interstate bank acquisitions, his "amendment would leave the way open for states to make explicit provision for such purchases and acquisitions if they wished to do so."[28] Accordingly, the Amendment expressly provided that the Federal Reserve Board could approve a bank holding company's application to acquire a bank located in another state only if such an acquisition "is specifically authorized by the statute laws of the state in which [the banking organization to be acquired] is located, by language to that effect and not merely by implication."[29]

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27 102 Cong. Rec. 6860 (1956); *accord id.* at 6861 (remarks of Sen. Bricker); *id.* at 6860 (remarks of Senator Bennett).

28 102 Cong. Rec. 6860 (1956); *accord id.* (remarks of Senator Bennett).

29 12 U.S.C. § 1842(d)(1).

Senator Douglas repeatedly analogized his Amendment to the McFadden Act. That federal statute, enacted in 1927 and amended in 1933, provides that a national bank may establish and operate branches within the state in which it is situated at any point outside of the limits of the city, town or village in which it is situated

> if such establishment and operation are at the time *authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication* or recognition, and subject to the restrictions as to location imposed by the laws of the State on State banks.[30]

Senator Douglas explained on the Senate floor that:

> [B]y the McFadden Act and other measures, national banks have been permitted to open branches *only to the degree permitted by State laws* and State authorities.
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> * * *
>
> [W]hat our Amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our Amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them*; and that is the provision of the McFadden Act.
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> * * *
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> [M]y Amendment is in principle almost identical with the present provision which governs branch banking.[31]

Thus, the Douglas Amendment, like the McFadden Act, reflects a Congressional judgment that, for purposes of banking, the model of a single national economic unit would *not* best serve the national interest. Rather, in the Douglas Amend-

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30 12 U.S.C. § 36(c) (emphasis added).

31 102 Cong. Rec. 6858, 6860 (1956) (emphasis added).

ment, state law was made controlling for federal purposes, as had long been true under the McFadden Act.[32] For this reason, Senator Douglas noted during the debates that his Amendment certainly should be supported by "[a]nyone who favors States rights."[33] Similarly, a co-sponsor of the Douglas Amendment stressed that "control of expansion of bank holding companies across State lines . . . is a matter of primary concern to State governments and is an area *best left to their discretion* . . . ."[34]

In sum, Congress clearly intended that each state's own policy should govern the extent to which, if at all, interstate bank acquisitions may occur within that state's borders, notwithstanding the obvious likelihood that disparate approaches would result.[35] Petitioners' complaint that the Massachusetts and Connecticut Acts prevent "a uniform approach to interstate bank acquisitions" simply ignores Congress' judgment that the states should make their own policy determinations concerning the federal barrier.[36]

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32 *See First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979); *Hempstead Bank* v. *Smith*, 540 F.2d 57, 59 (2d Cir. 1976).

33 102 Cong. Rec. 6860 (1956).

34 102 Cong. Rec. 6862 (prepared statement of Senator Payne) (emphasis added).

35 This is hardly—as petitioners imply (Pet. 22 & n.31)—a situation in which Congress' intent is sought to be derived from "isolated fragments of legislative history." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (emphasis added) (reliance "on a *single* statement made on the floor of the House"). Rather, as partially set forth here, the Senate debate contains substantial and clear evidence of Congress' intent in the Douglas Amendment. This Court has long recognized the significance of such floor discussion, especially where, as here (see n.26, *supra*), the statutory material at issue was added by amendment on the floor and the relevant floor remarks are by the provision's sponsors. *See, e.g.*, *Lewis* v. *United States*, 455 U.S. 55, 63 (1980); *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

36 There is no authority for petitioners' veiled suggestion that Congress actually intended to preclude the states from differentiating among out-of-state bank holding companies by state of origin in exercising the powers conferred upon them by the Douglas Amendment (Pet. 17-18). Petitioners rely (Pet. 18) upon a *June 1955 House* discussion of an earlier bank holding

II. All Prior Judicial And Administrative Precedents Interpreting The Douglas Amendment Recognize That Congress Authorized The States To Be Selective In Lifting The Federal Barrier To Interstate Bank Acquisitions.

The holdings below of the Federal Reserve Board and the Second Circuit—that the Douglas Amendment authorizes the states to be selective in determining the extent to which they lift the federal bar to expansion by out-of-state bank holding companies—are entirely consistent with *every* prior decision of the Board and those federal appellate courts that have considered the Douglas Amendment.

1. The Connecticut and Massachusetts Acts, like all but one of the total of 22 state statutes which have been enacted pursuant to the Douglas Amendment, lift the federal barrier to interstate bank acquisitions on a selective basis.[37] The Board, recognizing that this is precisely what Congress intended by the Douglas Amendment, has consistently approved acquisitions under such state statutes.

Until 1972 no state exercised the congressionally-conferred authority to enact legislation lifting the federal barrier. Then, Iowa enacted the first statute, which allowed the acquisition of Iowa banks only by the single out-of-state holding company that had owned banks in Iowa prior to January 1, 1971.[38] The

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company bill that did not contain the Douglas Amendment and that was *not* enacted. Such material plainly has no relevance for the proper interpretation of the Douglas Amendment, which was not added to the BHC Act until a year later on the *Senate* floor.

Petitioners also note that in 1955 the Senate Subcommittee on Banking heard testimony against an absolute ban in interstate banking and in favor of "a trade-area approach." *See Control of Bank Holding Companies, 1955: Hearings on S.880, S.2350 and H.R. 6227 before the Subcomm. of the Sen. Comm. on Banking and Currency*, 84th Cong., 1st Sess. 139-40 (1955). Based on this fact, petitioners argue that the passage of the Douglas Amendment proves that Congress rejected the idea of regional banking (Pet. 17 n.21). In fact, it proves precisely the opposite. Rather than adopting this less restrictive regional approach, Congress banned interstate banking entirely, and gave the states the power to lift the ban if and as they wished.

37 See pp. 4-6, *supra*.

38 Iowa Code Ann. § 524.1805 (West Supp. 1982-83).

Board, in approving additional acquisitions by that sole "grandfathered" institution, rejected the argument that "Congress did not intend to allow the state legislatures to *choose selectively* which out-of-state bank holding companies could enter the state."[39] To the contrary, the Board held that " 'State legislative judgments' " in the area of interstate bank acquisitions are determinative.[40]

Thereafter, the Board has repeatedly approved applications by out-of-state bank holding companies to acquire or establish in-state banks whose activities are limited by state law to a special purpose, such as the issuance of credit cards.[41] These limited purpose bank statutes contain restrictions which prevent banks owned by out-of-state holding companies from competing with local banks.[42]

Recently, the Board, whose interpretation of the BHC Act is entitled to substantial weight,[43] emphasized that, through the Douglas Amendment, Congress meant to "allow[ ] the states

39 *Northwest Bancorporation*, 28 Fed. Reg. 21530, 21531-32 (1973) (emphasis added), *aff'd, Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

40 28 Fed. Reg. at 21532. The Board has subsequently upheld other state statutes that effectively permit acquisitions by only grandfathered out-of-state bank holding companies. *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982) (Florida statute that permits only three out-of-state bank holding companies to acquire additional Florida banks); *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983) (Illinois statute effectively allowing acquisitions by only a single Missouri-based bank holding company).

41 *Citicorp*, 70 Fed. Res. Bull. 431 (1984) (Maryland statute); *Citicorp*, 68 Fed. Res. Bull. 499 (1982) (Delaware statute); *Provident National Corp.*, 68 Fed. Res. Bull. 194 (1982) (Delaware statute); *Citicorp*, 67 Fed. Res. Bull. 181 (1981) (South Dakota statute). Also see p. 5 & n.15, *supra*.

42 For example, Delaware law prescribes that an out-of-state holding company may control a Delaware bank only if the bank (1) is "operated in a manner and at a location that is not likely to attract customers from the general public," (2) operates "no more than a single office located in the state," and (3) has a minimum of $25 million in capital and surplus and employs "not less than 100 persons" in the State within one year after commencing business. Del. Code Ann. tit. 5, § 803 (Supp. 1982).

43 *E.g.*, *Securities Industry Ass'n* v. *Board of Governors*, 52 U.S.L.W. 4962, 4964 (U.S. June 28, 1984); *United States* v. *Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 719 (1975).

to apply their own policies regarding interstate banking to the acquisition by out-of-state bank holding companies of banks located within the borders of a state."[44] Explaining that it has "*consistently* construed the Douglas Amendment to authorize the states to limit or to restrict entry by out-of-state bank holding companies," the Board recognized that it has "approved a number of applications under statutes that admit only certain bank holding companies or that admit bank holding companies only under certain circumstances and that exclude all others."[45]

In considering the present transactions, the Board stated that "[n]othing in the history of the Douglas Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry."[46] In light of the deference due to this longstanding and plainly reasonable interpretation of the Douglas Amendment, further judicial review is unwarranted.

2. Petitioners wholly disregard the fact that the federal appellate court decisions which construe the Douglas Amendment uniformly give the Amendment the same interpretation as the Board and the court below.

In *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), the District of Columbia Circuit sustained the Board's approval of the interstate acquisitions under the Iowa statute described

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44 *Bank of New York Co.*, 70 Fed. Res. Bull. 527, 528 (1984); *accord First Bank System, Inc.*, 70 Fed. Res. Bull. ____, ____, (September 21, 1984) ("the purposes and legislative history of the Douglas Amendment . . . reflect an intent to preserve the authority of states over the structure of banking within their borders").

45 *Bank of New York Co.*, 70 Fed. Res. Bull. at 528 (emphasis added).

46 (Pet. App. A71). Both before the Board and the Second Circuit below, petitioners argued that the Douglas Amendment requires a state to choose between permitting *all* out-of-state bank holding companies to acquire banks within its borders or permitting no interstate acquisitions (Pet. App. A29, A71). This argument having proved unavailing, petitioners have shifted ground before this Court.

above (at p. 15 & n.38). In upholding the Iowa statute against a constitutional challenge, the Court of Appeals rejected the contention that Congress had restricted the states' authority under the Douglas Amendment so that they could only "extend the right to acquire in-state banks to all out-of-state bank holding companies or . . . prohibit such acquisitions entirely."[47] The District of Columbia Circuit held that neither the language nor the legislative history of the Amendment supported such a restrictive construction. The Court of Appeals in that case—like the Second Circuit below—held that Congress had anticipated "that states might be *selective* in allowing bank holding companies to cross state lines," and considered it "*obvious*" from the legislative history that the Amendment's purpose "was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion *would not contravene state policy*."[48] Thus, the District of Columbia Circuit in *Iowa Independent Bankers* held that state statutes enacted under the Douglas Amendment which permit only certain interstate bank acquisitions will withstand judicial scrutiny.

Last year, in *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1708 (1984), the District of Columbia Circuit reaffirmed its interpretation of the Douglas Amendment in *Iowa Independent Bankers*, stating "that the Douglas Amendment empowered states to discriminate among out-of-state bank holding companies when deciding which could enter."[49] The District of Columbia Circuit thereby recognized—as it had in *Iowa Independent Bankers*—that Congress intended the states to construct their own answers to the policy questions raised by interstate bank acquisitions, and for those answers to be paramount.

The Board's long-standing view that Congress expressly authorized the states to lift the federal interstate prohibition in

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47 511 F.2d at 1296.

48 *Id.* at 1296, 1297 (emphasis added).

49 715 F.2d at 613.

accord with their own particular policies is entirely consistent with this Court's discussion of the Douglas Amendment in *Lewis* v. *BT Investment Managers, Inc.* There, the Court recognized that the Douglas Amendment conferred upon the states the authority "*to create exceptions* to th[e] general prohibition, that is, *to permit* expansion of banking across state lines where it otherwise would be federally prohibited."[50] Massachusetts and Connecticut have simply exercised this authority to *create exceptions* to the federal bar by *permitting* interstate transactions that otherwise would be federally proscribed. Under these circumstances, no serious constitutional challenges to Massachusetts and Connecticut Acts can be maintained.

III. There Is No Conflict With This Court's Prior Commerce Clause And Compact Clause Precedents.

Under this Court's established precedents, Congress' grant of authority to the states in the Douglas Amendment drains all substance from petitioners' claims under the Commerce and Compact Clauses. Because the Second Circuit so recognized, it disposed of petitioners' constitutional objections in short order. Its decision—which is entirely consistent with this Court's precedents—does not warrant review.

1. It is well settled that Congress may exercise its plenary power under the Commerce Clause by conferring upon the states a power to regulate interstate commerce that they would not otherwise enjoy.[51] Where Congress has done so, "any action taken by a state within the scope of the Congressional authority is rendered invulnerable to Commerce Clause challenge."[52] In such circumstances, the negative implications of the Commerce Clause—upon which petitioners base their

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50 447 U.S. at 47 (emphasis added in part). Also see n.61, *infra*.

51 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44; *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315 (1945).

52 *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653 (1981).

Commerce Clause challenge (Pet. 14, 21, 23)—do not apply to the states any more than they do to Congress itself.[53]

Last Term, the Court emphasized that "[t]here is no talismanic significance" to any particular test for determining when Congress has authorized the states to adopt legislation in a particular area that would otherwise offend the Commerce Clause. The essential concern simply is that Congress has "unmistakably" evidenced its intent to do so.[54]

By opting in the Douglas Amendment for potentially diverse state policy determinations as opposed to a uniform approach to interstate bank acquisitions, Congress made clear that the concept of a single national economic unit has no application in the area of interstate bank acquisitions.[55] To assert—as petitioners do—that the negative implications of the Commerce Clause continue to govern in these circumstances is to defy the will of Congress.[56]

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53 *Id.* at 652-53.

54 *South-Central Timber, Inc.* v. *Wunicke*, 52 U.S.L.W. 4631, 4633 (U.S. May 22, 1984).

55 See pp. 11-12, *supra*.

56 Petitioners imply (Pet. 6) that recent legislative proposals concerning regional interstate banking demonstrate that the Douglas Amendment does not provide sufficient authority for the state statutes at issue. No such inference is warranted. In reporting out the bill to which petitioners refer (which was overwhelmingly approved by the Senate but which was not acted upon by the House), the Senate Committee on Banking and Currency stated that it "believes that the state statutes concerning interstate banking [such as the Connecticut and Massachusetts Acts] are consistent with both the constitution and the federal banking statutes . . . ." S. Rep. No. 98-560, 98th Cong., 2d Sess. 49 (1984). During the Senate floor debate on the bill, Senator Garn, the sponsor of the legislation, stressed that this proposal was "merely a clarification of the powers that the States have always retained under the Douglas amendment," and Senator Tsongas asserted that "we do not intend to express or imply any disagreement with the Second Circuit's interpretation of the present Douglas amendment . . ." 130 Cong. Rec. 11153 (1984) (prepared statements); *accord id.* at 11154 (Remarks of Sen. Bentsen noting that many reciprocal interstate statutes were "tied up in court due to the opposition of large money center banks"). In any event, this Court has long recognized that unenacted legislative proposals do not provide a reliable guide to the meaning of an existing law enacted by a prior

Petitioners nonetheless claim that the Douglas Amendment does not authorize states to distinguish among out-of-state bank holding companies on the basis of state-of-origin. Petitioners thereby seek to limit Congress' authorization of state legislation in a manner which finds *no* support in either the language or the legislative history of the Douglas Amendment. As the Board and the courts have consistently ruled, the Douglas Amendment authorizes the states to be *selective* in permitting out-of-state bank holding companies to enter.[57]

This Court established in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), that where Congress exercises its plenary power under the Commerce Clause "by removing obstacles to state action" that would otherwise exist, Congress thereby

> put[s] the full weight of its power behind existing and future state legislation to sustain it from attack under the commerce clause . . . , subject only to the exceptions *expressly* provided for.

328 U.S. at 430-31 (emphasis added). The Massachusetts and Connecticut Acts are unquestionably within the literal terms of the Douglas Amendment's authorization of state legislation in that Massachusetts and Connecticut have "specifically authorized" interstate bank acquisitions "by the[ir] statute laws . . . by language to that effect and not merely by implication," 12 U.S.C. § 1842(d)(1). Under these circumstances, *Prudential Insurance Co.* v. *Benjamin* requires that petitioners, in order to prevail in their Commerce Clause challenge, must demonstrate that Congress, in the Douglas Amendment, "expressly provided for" specific "exceptions" to its general authorization and that the Massachusetts and Connecticut Acts are within such an express exception. Petitioners do not, and

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Congress. *E.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981). Nor is congressional inaction on such a proposal significant, for Congress may well have concluded that the existing law is adequate and requires no revision. *See, e.g.*, *American Trucking Ass'ns* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416-18 (1967).

57 See pp. 15-19, *supra*.

cannot, demonstrate the existence of any pertinent exception to the Douglas Amendment. They argue instead that the Massachusetts and Connecticut Acts are without the authorization of state legislation contained in the Douglas Amendment in that the Amendment makes no specific mention of state statutes which permit interstate bank acquisitions only by bank holding companies located in particular states (Pet. 19). It is too late in the day for petitioners to eliminate the requirement that "exceptions be *expressly* provided for" which the Court articulated over 38 years ago in *Prudential*.[58]

Following *Prudential*, this Court recently refused to impose a limitation on Congress' grant to the states of authority over interstate commerce in insurance similar to that suggested by petitioners in this case. In *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 653 (1981), the Court—in rejecting the argument that the McCarran-Ferguson Act should be construed so as not to permit a retaliatory state tax that discriminated among out-of-state insurers—emphasized that it could find "no such limitation" on the states' power "in the language or the history of the Act." Since Congress had given the states authority to regulate interstate insurance activity without evidencing any intent to impose such a limitation, this Court refused to do so.

Quite properly, the court below followed the same course in rejecting petitioners' contention that the Douglas Amendment should be construed so as not to permit the states to distinguish among out-of-state bank holding companies (Pet. App. A29).

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58 *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-960 (1982), and *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982), do not establish, as petitioners claim (Pet. 22), that Congress must expressly authorize the precise form of interference with interstate commerce caused by the challenged state action. Those decisions merely involved savings clauses that Congress had provided for *otherwise valid* state laws. The Douglas Amendment obviously cannot be viewed as a mere state law savings clause; among other things, such a savings clause is expressly set forth in a separate provision of the BHC Act, 12 U.S.C. § 1846. Nor would it make sense for this Court to impose a requirement of minute specificity for Congressional authorizations of state legislation. Such a requirement would serve only to frustrate legitimate Congressional efforts to remove state action from the reach of the Commerce Clause.

As in the McCarran-Ferguson Act, Congress in the Douglas Amendment imposed no limitation on the authority it conferred upon the states to alter the federal barrier to interstate bank acquisitions.[59]

This case in fact presents even less of a Commerce Clause issue than any of the Court's prior decisions sustaining state legislation enacted pursuant to Congressionally conferred authority. As the Second Circuit recognized below (Pet. App. 29), the Connecticut and Massachusetts Acts do not restrain interstate commerce; they promote it. Petitioners' arguments to the contrary notwithstanding (Pet. 23), the inescapable fact is that the Massachusetts and Connecticut Acts *permit* interstate acquisitions—such as the three transactions approved below by the Board—that otherwise would be *prohibited* by federal law. If the Acts were struck down, the Douglas Amendment's prohibition would be restored in full and *no* interstate acquisitions of Connecticut and Massachusetts banks could occur.[60]

Thus, in the context of this case, *federal* law in the form of the Douglas Amendment—not the state statutes at issue—restricts interstate commerce. All Massachusetts and Connecticut have done is exercise the authority—"to *create exceptions* to th[e] general prohibition" on interstate bank acquisitions—that this Court stated in *Lewis* v. *BT Investment Managers, Inc.*, was conferred upon the states by the Douglas Amendment.[61] For

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59 Like the Second Circuit below, the District of Columbia Circuit—the only other circuit to have considered the question—has held that the Douglas Amendment does not contain any explicit or implicit limitation or restriction on a state's power to alter the federally-imposed barrier to interstate bank acquisitions. *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d at 1296-97. The case is discussed in further detail at pp. 17-18, *supra*.

60 This Court has never held that it is a Commerce Clause violation to *promote* interstate commerce that otherwise would not exist at all. The *South-Central Timber* decision, upon which petitioners rely (Pet. 23), involved an in-state processing requirement that clearly *restricted* interstate commerce. 52 U.S.L.W. at 4631-32.

61 447 U.S. at 47. The Connecticut and Massachusetts Acts clearly impose no "restrictions" on bank holding company activities beyond those imposed under federal law by the Douglas Amendment, and thus are in no

this reason, the Second Circuit below held "that the Massachusetts and Connecticut statutes do not violate the Commerce Clause" in that "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). Because that decision was entirely consistent with *Lewis* and this Court's other Commerce Clause precedents, there is no need for review by this Court.

2. There is, if anything, even less justification for review of petitioners' Compact Clause claim. Applying this Court's established precedents, the Second Circuit below observed that, even if the Connecticut and Massachusetts Acts were "treated as a compact," the arrangement "would *only* violate the Compact Clause if it were a 'combination tending to the increase of *political power* in the States, which may encroach upon or interfere with the supremacy of the United States.' "[62] Petitioners do not dispute the standard applied by the Second Circuit; rather, they attack its conclusion that the Massachusetts and Connecticut Acts do *not* "in any way increase the *political power* of the New England states or encroach upon or interfere with the just supremacy of the United States."[63]

Petitioners contend that the challenged statutes increase the political power of the New England states in a manner inconsistent with federal supremacy in that they *omit to permit* non-New England-based bank holding companies to acquire

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way at odds with this Court's further observation in *Lewis* that "it is doubtful" that the Douglas Amendment "authorizes state *restrictions* of any nature on bank holding company activities." *Id.* (emphasis added). In any event, as the opinion makes clear, the Court was referring to restrictions on holding company activities permitted under Section 4(c)(8) of the BHC Act, 12 U.S.C. § 1843(c)(8), which relates only to *non-banking* activities, such as the trust advisory services at issue in *Lewis*. The Court clearly was not speaking to holding company acquisitions of *banks*, which are regulated under Section 3 of the BHC Act, 12 U.S.C. § 1842.

62 (Pet. App. A32) (emphasis added) (*quoting* and *citing United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); *New Hampshire* v. *Maine*, 426 U.S. 363, 369 (1976); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893)).

63 (Pet. App. A32 (emphasis added)).

Massachusetts and Connecticut banks (Pet. 25-26). Nowhere have petitioners provided the slightest indication of just how the alleged compact increases the power of Massachusetts and Connecticut. Although the challenged statutes purportedly injure petitioners by not allowing non-New England bank holding companies to acquire Connecticut and Massachusetts banks, injury to *private parties* is hardly the same thing for purposes of the Compact Clause as injury to *states*. In any event, it is the pre-existing federally-imposed barrier of the Douglas Amendment—and not the challenged statutes—that prevents entry into Massachusetts and Connecticut by non-New England bank holding companies.

In claiming further that the challenged statutes "cause interstate divisiveness and antagonism" (Pet. 25), petitioners ignore the federal statutory context within which the Connecticut and Massachusetts Acts were enacted. The Acts have neither divided the states one from the other, nor have they "prevent[ed] a uniform approach to interstate banking" (Pet. 25). That was done by Congress in the Douglas Amendment. No decision of this Court has ever held that state action—occurring in an area where Congress unmistakeably made potentially disparate state policy determinations paramount—violates the Compact Clause.[64]

Petitioners make the sweeping claim (Pet. 27) that the Massachusetts and Connecticut Acts interfere with federal supremacy by "creating a new level of regulation . . . not provided for by the Congress in its regulation of interstate banking." This claim is demonstrably inaccurate. Neither Act creates any new regional or multi-state regulatory authority. Each state continues to regulate acquisitions of in-state banks

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64 Insofar as petitioners claim that the Massachusetts and Connecticut Acts cause economic injury to states outside New England (Pet. 26), this Court has previously established that, unless such injury "transgresses the bounds of the Commerce Clause," the federal structure, with which the Compact Clause is exclusively concerned, is not implicated. *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. at 478. Because the challenged statutes plainly do not offend the Commerce Clause (see pp. 19-24, *supra*), under *United States Steel* they also do not violate the Compact Clause.

(and the bank holding companies which own them) using its own pre-existing regulatory framework and its own banking regulatory officials.

Petitioners also claim that the Massachusetts and Connecticut Acts create an "interstate banking system" that somehow "impair[s]" the federal government's "paramount interest in regulating the interstate expansion of bank holding companies" (Pet. 28). It does not. Congress by the Douglas Amendment has exercised its plenary power to regulate interstate commerce in bank acquisitions by authorizing the states to determine whether, and to what degree, to permit interstate bank acquisitions. By exercising this federally-granted authority, Connecticut and Massachusetts cannot reasonably be said to impair the interest of the federal government in the regulation of interstate bank acquisitions.[65]

Congress, when it adopted the Douglas Amendment, rejected the Senate Banking and Currency Committee version of the BHC Act which would have allowed the Federal Reserve Board, rather than the states, to determine the degree to which interstate bank acquisitions would occur. For this reason, the

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65 The only federal interest in regulating bank acquisitions is spelled out in Section 3 of the BHC Act, 12 U.S.C. § 1842. That provision requires the Board, before approving a bank acquisition, to consider whether the acquisition will decrease competition and increase concentration, whether the acquiring company has the financial and managerial resources to make the acquisition a success and whether the acquisition will meet the needs of the communities to be served. 12 U.S.C. § 1842(c). Because the BHC Act requires Board approval of *all* bank acquisitions—whether *intrastate* or *interstate*—these bedrock federal interests cannot be encroached upon by any state statute enacted under the Douglas Amendment.

Petitioners further claim (Pet. 27 n.43, 28) that the Acts collide with a failing bank provision of federal law, 12 U.S.C. § 1823(f), added by the Garn-St Germain Depository Institutions Act of 1982 (the "Garn-St Germain Act"). No such clash can occur. The provisions of the Garn-St Germain Act control, by their express terms, "[n]otwithstanding [the Douglas Amendment] or any other provision of law, State or Federal . . . ." 12 U.S.C. § 1823(f)(4)(i). Under this unequivocal assertion of federal supremacy, the Massachusetts and Connecticut Acts would be pre-empted by federal law where they would otherwise conflict with the Garn-St Germain Act. *See Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152-53 (1982).

Board correctly found below that the Douglas Amendment should be read as a Congressional "renunciation of the federal interest in" determining the degree to which interstate bank acquisitions may occur. Once the Douglas Amendment is properly understood, no reasonable claim of encroachment upon federal supremacy may be maintained—as the Second Circuit found below (Pet. App. A32). Because the Court of Appeals' decision in no way conflicts with this Court's prior Compact Clause precedents, there is no reason for review by this Court.[66]

3. In the final analysis, petitioners' arguments against the Massachusetts and Connecticut Acts are premised on the notion that federal and state barriers to full interstate banking should be removed. The *policy questions* petitioners raise have already been resolved by Congress; they are not *legal issues* to be decided by the Court. Under Article I of the Constitution, Congress' judgment in the Douglas Amendment—that the national interest is best served by permitting the states to determine for themselves the degree to which interstate bank acquisitions should be permitted—is determinative. When petitioners' rhetoric about national economic and political unity is stripped away, it is clear that petitioners ask the Court to review and overturn state statutes—in an area where Congress has explicitly authorized potentially disparate state policy determinations—simply because those state statutes, and the congressional authorization pursuant to which they were enacted, conflict with petitioners' desires. Accordingly, petitioners have failed to establish any entitlement to review by this Court.

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66 Petitioners' claim that the Connecticut and Massachusetts Acts are particularly "objectionable" because they supposedly reflect "concerted conduct" by a "group of states" (Pet. 21) is entirely beside the point. Although the Douglas Amendment unquestionably uses the singular tense in describing state legislative enactments (Pet. 15), nothing in the Amendment's language precludes a state from acting with other states, if it chooses, in lifting the federal prohibition. Petitioners do not, and cannot, point to anything in the Amendment's legislative history indicating an intent to restrict the states' authority in this regard.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

WILMOT T. POPE*
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
(617) 227-5020

Counsel for Intervenor-Respondent Bank of New England Corporation

Of Counsel:

LAURENCE H. TRIBE
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

BERTRAM M. KANTOR*
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS*
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 371-6000

Counsel for Intervenor-Respondent Hartford National Corporation

**Counsel of Record*

APPENDIX

Rule 28.1 Statement of Respondents CBT Corporation, Bank of New England Corporation and Hartford National Corporation

CBT Corporation, Bank of New England Corporation and Hartford National Corporation each have no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.

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No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY AND CITICORP,

Petitioners,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT BANK OF BOSTON CORPORATION IN OPPOSITION TO PETITION

Of Counsel:

GARY A. SPIESS
ROBERT L. KLIVANS
P.O. Box 1864
Boston, Mass. 02106

MARK A. WEISS
STUART C. STOCK*
GREGG H. LEVY
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel for Respondent Bank of Boston Corporation

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

In the Douglas Amendment to the Bank Holding Company Act, Congress purposefully established a general *federal* statutory prohibition on the acquisition of each state's local banks by out-of-state bank holding companies, thereby effectively partitioning the nation into separate state units for purposes of such acquisitions. In the same statutory provision, however, Congress also expressly conferred upon the states plenary authority to remove the general federal prohibition on interstate acquisitions "to the degree" they deem appropriate (see p. 12, below). Congress — in the words of a co-sponsor of the Douglas Amendment — considered acquisitions of local banks by out-of-state bank holding companies to be "a matter of primary concern to the State governments" and thus "an area best left to their discretion" (see p. 12, below).

Exercising the plenary authority conferred in the Douglas Amendment, Massachusetts enacted a statute that permits the acquisition of its local banks by bank holding companies based in other New England states that afford Massachusetts holding companies comparable acquisition opportunities. Subsequently, Connecticut enacted a statute effecting a similar removal of the Douglas Amendment's general interstate prohibition with respect to its local banks. Against this background, the questions presented are:

1. Do the Connecticut and Massachusetts statutes exceed the scope of the authority conferred upon the states in the Douglas Amendment, which was enacted principally to enable the states to determine, in accordance with their own policies, the degree to which interstate bank holding company acquisitions of their local banks should be permitted and which reflects no congressional intent to limit this state authority?

2. Do the Connecticut and Massachusetts statutes, which were enacted pursuant to the plenary authority

granted to the states by Congress in the Douglas Amendment and which serve only to permit a form of interstate commerce that otherwise would be federally prohibited, constitute impermissible restrictions on interstate commerce that violate the Commerce Clause?

3. Do the Connecticut and Massachusetts statutes, which represent nothing more than an exercise of authority that Congress has conferred on the states in the Douglas Amendment and which neither create any new level of sovereignty nor in any way restrict federal authority, constitute improper state encroachment upon the federal structure that violates the Compact Clause?

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT BANK OF BOSTON CORPORATION IN OPPOSITION TO PETITION

Respondent Bank of Boston Corporation, which was an intervenor in the court below, submits this brief in opposition to the petition for certiorari filed by Northeast Bancorp, Inc., Union Trust Company and Citicorp.[1]

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[1]The listing required for Bank of Boston Corporation by Rule 28.1 appears in Appendix A to this brief.

STATEMENT OF THE CASE

a. The Relevant Statutory Regime. Prior to 1956, a bank holding company could acquire banks located anywhere in the country, without advance regulatory approval and without regard to the location of the holding company. During this period, a number of holding companies established extensive interstate networks, acquiring banks located in communities outside their home states.[2] This interstate expansion of bank holding companies was viewed with considerable alarm in Congress, for it was perceived to threaten our longstanding tradition of local control of banking institutions.[3]

As a result, in the Bank Holding Company Act of 1956, Congress established a *federal* prohibition on interstate bank holding company acquisitions. Specifically, Congress provided that a bank holding company must obtain the approval of the Board of Governors of the Federal Reserve System ("the Board") before acquiring another banking organization.[4] And, in the so-called Douglas Amendment to the Bank Holding Company Act, Congress generally prohibited the Board from approving a bank holding company's acquisition of any bank located outside the holding company's home state.[5] Thus, as a matter of federal policy, Congress isolated each state from

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[2]See, *e.g.*, 102 Cong. Rec. 6858 (1956) (remarks of Senator Douglas) (describing interstate expansion of two Minneapolis-based bank holding companies and a California-based bank holding company).

[3]See, *e.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 2 (1955):

> "There has developed in this country . . . a conception of the independent unit bank as an institution having its ownership and origin in the local community . . . . Its activities are usually fully integrated with the local economic and social organization. The bank holding company threatens to destroy this democratic grassroots institution."

See also, *e.g.*, 102 Cong. Rec. 6857-60 (1956) (remarks of Senator Douglas); 101 Cong. Rec. 8028-29 (1955) (remarks of Mr. Patman).

[4]12 U.S.C. 1842(a).

[5]12 U.S.C. 1842(d) (A96).

every other state with regard to bank holding company acquisitions, purposefully departing from our general model of a unified national market.

Congress did not wish, however, to prevent the states from allowing interstate acquisitions of their local banks if they so desired; on the contrary, Congress was intent that the states should have authority to permit such acquisitions to the degree they wished (see p. 12, below). Accordingly, in the Douglas Amendment, Congress expressly provided that the Board may approve an interstate bank holding company acquisition if such acquisitions are "specifically authorized by the statute laws" of the state in which the bank to be acquired is located.[6] Congress did not limit this authority in any respect (see p. 13, below).

Since 1956, states have enacted statutes creating a variety of exceptions to the Douglas Amendment's general prohibition on interstate bank holding company acquisitions, typically removing the federal prohibition only to a limited degree (see pp. 15-16, below). In December 1982, Massachusetts enacted one state statute of this sort—a so-called reciprocal regional statute—in which it authorized bank holding companies based in any of the other New England states—Connecticut, Maine, New Hampshire, Rhode Island and Vermont—to acquire Massachusetts banking organizations if the acquiring holding company's home state affords comparable acquisition opportunities to Massachusetts banking organizations.[7] Connecticut passed a reciprocal regional statute in June 1983, similarly permitting the acquisition of its local banks by bank holding companies based in the other New England states.[8]

The Massachusetts Act and Connecticut Act each resulted from independent action by the respective State's legislature.

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[6] *Id.*

[7] Mass. Gen. L. Ann. ch. 167A, § 2 ("the Massachusetts Act") (A101-02).

[8] Conn. Act No. 83-441, § 2 (1983) ("the Connecticut Act") (A99).

Neither State was obligated to pass such a statute; neither State made any agreement with the other in doing so; and each State remains free to repeal its statute at any time (A97-A102).[9]

Furthermore, neither Act has any effect on the Douglas Amendment's general prohibition on interstate acquisitions by bank holding companies based outside New England. Non-New England holding companies continue to be barred from acquiring Connecticut and Massachusetts banks not by state law, but by the federal Douglas Amendment.

b. The Relevant Transactions and Board Proceedings. Following passage of the Connecticut and Massachusetts Acts, applications were filed seeking Federal Reserve Board approval of three separate interstate acquisitions, each involving a Connecticut banking organization and a Massachusetts banking organization.[10] In opposing the applications, petitioners did not deny that the Connecticut and Massachusetts Acts in fact make possible a form of interstate commerce—interstate bank holding company acquisitions—that the Douglas Amendment otherwise would prohibit, but they nonetheless contended that

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[9]Each of the other New England states has chosen a very different approach to interstate banking. New Hampshire and Vermont have not enacted any legislation removing the Douglas Amendment's general prohibition on interstate acquisitions of their local banks. Maine has authorized essentially unrestricted acquisition of its banks by out-of-state holding companies. Me. Rev. Stat. Ann. tit. 9 (Supp. 1984). And Rhode Island has enacted a statute that removes the Douglas Amendment's general prohibition on a regional basis for two years ending June 30, 1986, and thereafter on a nationwide reciprocal basis. R.I. Gen. Laws §§ 19-30-1, 19-30-2.

[10]The three transactions were: the merger of Bank of New England Corporation, a Massachusetts bank holding company, and CBT Corporation, a Connecticut bank holding company; the acquisition of Arltru Bancorporation, a Massachusetts banking organization, by Hartford National Corporation, a Connecticut bank holding company; and the acquisition of Colonial Bancorp, Inc., another Connecticut bank holding company, by Bank of Boston Corporation, a Massachusetts bank holding company.

the Acts impermissibly restrain interstate commerce in violation of the Commerce Clause.[11] In addition, petitioners argued that the Acts give rise to an interstate compact, to which Congress has not consented, that violates the Compact Clause.[12]

After thoroughly considering these objections, the Board approved the transactions, determining that the Connecticut and Massachusetts Acts provide the specific state statutory authorization required by the Douglas Amendment (A37, A74, A83) and finding no adequate basis for declaring the Acts unconstitutional (A38-A41, A49-A71, A74-A75, A83). While questioning whether the Acts could be sustained under the Commerce Clause absent the authority granted to the states in the Douglas Amendment, the Board concluded, based on a lengthy review of the Amendment's language, history and prior construction (A61-A71), that the states are not limited to permitting entry either by all out-of-state holding companies or by none (A71). The Board thus recognized the plenary nature of the states' authority to remove the Amendment's general prohibition on interstate acquisitions of their local banks to the degree the states choose.

As for the Compact Clause, the Board viewed the Acts as "part of an effort to create a regional banking zone," but it did not find that the New England states had entered into any actual agreement or confederation (A51-A52). Moreover, the Board recognized that, even if the Acts were considered part of an "implicit" compact or agreement, they would violate the Compact Clause only if they involved "an enhancement of state powers at the expense of federal supremacy" (A52). In this regard, the Board found, based on its detailed analysis of the Douglas Amendment's history and prior construction (A62-A71), that the Amendment constitutes "a renunciation of

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[11]U.S. Const. Art.I, § 8, cl.3.

[12]U.S. Const. Art.I, § 10, cl.3.

federal interest in regulating the interstate acquisitions of banks by bank holding companies" (A52).

c. The Decision Below. On judicial review, the Second Circuit unanimously sustained the Board's orders approving the three transactions (A21).[13] In its decision, the Court of Appeals first considered the scope of the Douglas Amendment, rejecting petitioners' contention that the states have only limited authority to remove the Amendment's general prohibition on interstate acquisitions (A29).

Having recognized the plenary nature of the states' authority under the Amendment, the Court of Appeals had no difficulty disposing of petitioners' constitutional claims. It found that, under this Court's established precedents, Congress' grant of authority to the states in the Douglas Amendment renders the Connecticut and Massachusetts Acts "'invulnerable' to challenge" under the Commerce Clause (A30-A31).[14] As for the Compact Clause, the court—like the Board—found no actual agreement or confederation of states; and it concluded that, even if the Acts were "treated as a compact," there would be no threat of encroachment upon the "just supremacy of the United States" that would violate that Clause (A31-A32).

SUMMARY OF ARGUMENT

Petitioners naturally claim (*e.g.*, Pet. 9-15) that the Connecticut and Massachusetts Acts raise important questions of federal policy with respect to interstate banking. But the policy issues raised by petitioners were clearly and unequivocally

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[13]While petitioner Citicorp sought review of all three Board orders, petitioners Northeast and Union Trust sought review only of the Bank of New England/CBT order. The petitions for review were consolidated by the Second Circuit prior to decision.

[14]The court recognized as well that the Connecticut and Massachusetts Acts facilitate interstate bank holding company acquisitions that the Douglas Amendment otherwise would prohibit and that the Acts thus should serve to promote, rather than to restrict, interstate commerce (A29).

resolved by Congress nearly thirty years ago when it passed the Douglas Amendment.

In enacting the Douglas Amendment, Congress was determined to halt the unrestrained interstate expansion of bank holding companies and to ensure that the states would have full control over the acquisition of their local banks in accordance with their own local policies. As a co-sponsor of the Douglas Amendment made clear, the "expansion of bank holding companies across state lines" was considered to be "a matter of primary concern to the State governments" and "an area best left to their discretion" (see p. 12, below). Congress in the Douglas Amendment therefore erected a general *federal* barrier to interstate bank holding company acquisitions and granted the states plenary authority to remove that barrier—in Senator Douglas' own words—"to the degree" that the states might choose.

Thus, contrary to petitioners' repeated assertions (*e.g.*, Pet. 9, 16), Congress—not the states—purposefully put aside in this area usual federal principles of economic unity and determined that state policies alone shall govern. The Board itself recently reaffirmed that Congress' essential intent in the Douglas Amendment was to "allow[] the states to apply their own policies . . . to the acquisition [of their local banks] by out-of-state bank holding companies" (see p. 17, below). And the only other Court of Appeals to consider the Douglas Amendment has recognized—like the court below—that Congress' very purpose in the Douglas Amendment was to empower "the *states* . . . to control the expansion of bank holding companies across state lines so that such expansion *would not contravene state policy*" (see pp. 17-18, below). Petitioners do not point to any conflicting Board or court precedent, nor is there any.

In light of Congress' established purpose in the Douglas Amendment, this case presents no significant constitutional issue. Under the Court's settled precedents, there is no impermissible interference with interstate commerce in violation of the Commerce Clause, where, as here, Congress expressly

granted the states full authority to control the relevant aspect of interstate commerce (see pp. 19-20, below); and there is no conceivable state encroachment upon the federal structure in violation of the Compact Clause, where, as here, the states have done nothing more than exercise authority that Congress itself has conferred (see pp. 24-25, below). The decision below sustaining the Connecticut and Massachusetts Acts on the basis of the Douglas Amendment thus is wholly in accord with this Court's precedents.

Petitioners' present challenges would *not* enhance interstate commerce or restore a unitary federal system in the area of interstate banking; on the contrary, because of the Douglas Amendment's general federal prohibition on interstate bank holding company acquisitions, invalidation of the Connecticut and Massachusetts Acts would mean *less* interstate commerce and a *less* cohesive interstate banking system (see p. 22, below)—as the court below fully appreciated (A29). Only Congress can restore the general federal model from which it chose to depart in 1956. In these circumstances, the decision below presents no issue meriting review by this Court.[15]

REASONS FOR DENYING THE WRIT

I. In the Douglas Amendment, Congress Granted the States Plenary Authority to Determine the Degree to Which, If at All, Interstate Bank Holding Company Acquisitions Shall Be Permitted.

Petitioners' entire challenge is premised on the notion that the Douglas Amendment effected no departure from our gen-

[15]Amicus Chase Manhattan suggests (Br. 19 n.26) that this case warrants review to consider whether the challenged Acts should be subjected "to heightened equal protection scrutiny." This Court has repeatedly held, however, that such economic regulation is to be judged solely under the rational relationship test, which the Court of Appeals properly applied (A32-A33). See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976) (per curiam). In any case, petitioners have chosen not to present any equal protection question for review (cf. Pet.I) and therefore no such question is now before the Court. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 339 n.4 (1971); *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954).

eral model of a unified national market and that interstate bank holding company acquisitions are subject to usual principles of free trade among the states. Nothing could be further from the truth.

1. In adopting the Douglas Amendment in 1956, Congress purposefully put aside our general federal model. Senator Douglas of Illinois and many others in Congress were extremely concerned with the uncontrolled expansion of bank holding companies across state lines.[16] They were determined to bar such expansion *as a matter of federal law.*[17]

Therefore, in the Douglas Amendment, Congress established a general federal prohibition on interstate bank holding company acquisitions (see p. 2, above). By doing so, Congress—not any state—effectively partitioned the nation into separate state units and thereby, as petitioners have chosen to describe it (*e.g.*, Pet.9), "balkanized" the entire nation for purposes of interstate banking.[18] Such renunciation of usual federal principles of economic unity was not an unintended result; Congress was fully apprised regarding the consequences of its action.

Thus, the Douglas Amendment was opposed on the specific ground that it would effectively "require discrimination in interstate commerce," permitting bank holding companies to make acquisitions within a state if they are based there, but

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[16]See, *e.g.*, 102 Cong. Rec. 6857-58 (1956) (remarks of Senator Douglas); *id.* at 6861-62 (remarks of Senator Payne); 101 Cong. Rec. 8028 (1955) (remarks of Mr. Patman). Because the Douglas Amendment was added to the Bank Holding Company Act of 1956 on the Senate floor, its legislative history consists entirely of floor discussion.

[17]See, *e.g.*, 102 Cong. Rec. 6859 (1956) (remarks of Senator Douglas); *id.* at 6862 (remarks of Senator Payne).

[18]As Senator Douglas explained on the Senate floor, the Amendment's "immediate practical effect" was "to bar the expansion of bank holding companies across State lines." 102 Cong. Rec. 6860 (1956). See also *id.* at 6859; *id.* at 6860 (remarks of Senator Bennett).

prohibiting acquisitions in the same state by bank holding companies located elsewhere.[19] Such an approach was said to be "out of harmony" with the precepts that generally underlie our nation's economic system.[20] Nonetheless, the Amendment was adopted.

The Douglas Amendment, with its general prohibition on interstate acquisitions, does indeed reflect an unusual departure from our general federal model. But it is for this very reason that petitioners' reliance on ordinary Commerce Clause principles entirely misses the mark. The court below clearly recognized as much (A28-A32).

2. In putting aside our general federal model in the Douglas Amendment, Congress did not merely decide that interstate bank holding company acquisitions should be federally barred. It also specifically determined that the states should be empowered to determine the permissibility of such acquisitions in accordance with their own particular policies.

The interstate expansion of bank holding companies that led to passage of the Douglas Amendment was viewed as a serious and direct threat to our longstanding tradition of local control over banking matters (see p. 2, above).[21] The House, however, initially passed a bill that did not provide for state control of interstate bank holding company acquisitions; the House bill

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[19]*Id.* at 6860 (1956) (remarks of Senator Bennett).

[20]*Id.*

[21]This Court previously has recognized that, "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). See also *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 358 (1963). States often are concerned, for example, that the loss of local control over their banks will diminish the willingness of such institutions to meet the particular needs of the communities in which they are located. In addition, substitution of out-of-state ownership for local control may impair a state's ability to regulate its own banks.

would have prohibited *all* such acquisitions.[22] In the Senate, the House bill was viewed as an "unwarranted interference with States' rights."[23] It was recognized that there might well be situations in which "such expansion was welcomed by the State involved."[24]

Within this context, the Douglas Amendment was a logical compromise, designed to empower the states to permit acquisition of their own local banks by out-of-state holding companies to the extent that they might wish to do so. Thus, as this Court previously has recognized, Congress in the Douglas Amendment did not merely establish a general federal prohibition on interstate acquisitions; it also expressly "*granted to the States . . . authority* to create *exceptions* to [the] general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."[25]

By this grant of authority, Congress clearly intended to allow state policies—and state policies alone—to determine the permissibility of out-of-state acquisitions of local banks and thus to afford the states the local control with which the Senate was concerned.[26] A co-sponsor of the Douglas Amendment empha-

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[22]See H.R. 6227, 84th Cong., 1st Sess. § 5(c) (1955).

[23]102 Cong. Rec. 6752 (1956) (remarks of Senator Robertson, floor manager for the Senate Committee bill, quoting Senator Maybank).

[24]102 Cong. Rec. 6755 (1956) (remarks of Senator Robertson). See also, *e.g.*, *id.* at 6752.

[25]*Lewis* v. *BT Investment Managers, Inc.*, *supra*, 447 U.S. at 47 (first emphasis added). On the Senate floor, Senator Douglas emphasized that, while no state then authorized interstate bank holding company acquisitions, his "amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided." 102 Cong. Rec. 6860 (1956). See also, *e.g.*, *id.* (remarks of Senator Bennett).

[26]To ensure that interstate acquisitions would be permitted *only* when the relevant State so desired, Congress prescribed in the Amendment that such an acquisition must be "*specifically* authorized by the statute laws of the State . . ., *by language to that effect and not merely by implication.*" 12 U.S.C. § 1842(d) (emphasis added).

sized that "the control of expansion of bank holding companies across State lines . . . is a matter of primary concern to the State governments . . . ."[27] He therefore deemed such expansion "an area *best left to [the States'] discretion.*"[28]

Any possible doubt as to Congress' intent is dispelled by Senator Douglas' own explanation of his Amendment. The Senator repeatedly analogized the Amendment's purpose to the essential policy long embodied in the McFadden Act of 1927—the federal statute that permits national banks to establish branches within a state only to the extent that the state banks are authorized to do so by the state's own laws.[29] As Senator Douglas explained:

> "[B]y the McFadden Act and other measures, national banks have been permitted to open branches *only to the degree permitted by State laws* and State authorities."[30]

He then added:

> "[W]hat our Amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them* . . . ."[31]

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[27]102 Cong. Rec. 6862 (1956) (statement of Senator Payne).

[28]*Id.* (emphasis added). Given the perceived threat to local bank control posed by unchecked interstate bank holding company expansion, Senator Payne also stressed: "The purpose of [the Douglas Amendment] is to return to the States their traditional control over the activities of the State banks now nominally under the State's authority." *Id.*

[29]12 U.S.C. § 36(c). The McFadden Act also prevents national banks from branching across state lines.

[30]102 Cong. Rec. 6858 (1956) (emphasis added).

[31]*Id.* (emphasis added). Senator Douglas also stated: "[M]y Amendment is *in principle* almost identical with the present provision which governs branch banking." *Id.* at 6860 (emphasis added).

Thus, as had long been true of bank branching under the McFadden Act, Congress determined in the Douglas Amendment that state policy should be supreme in the area of interstate bank holding company acquisitions.[32] Moreover, Congress did not evidence any intent whatever to restrict the states' policy choices; neither the language nor the legislative history of the Douglas Amendment reflects any limitation upon the states' authority.[33] And Congress certainly did not indicate any concern that the states might adopt disparate policies regarding interstate acquisitions of their local banks.[34] Rather, having decided that usual federal principles of economic unity should not govern in this area, Congress expressly granted the states plenary authority to determine the degree to which, if at all, interstate bank holding company acquisitions should be

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[32]Cf., *e.g.*, *First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979) ("The policymaking role in [the] area [of branch banking] is given to the state legislatures."); *Hempstead Bank* v. *Smith*, 540 F.2d 57, 59 (2d Cir. 1976) (The McFadden Act "incorporate[s] state standards into federal law.").

[33]Petitioners imply that Congress intended to preclude the states from distinguishing among out-of-state bank holding companies under the Douglas Amendment (Pet. 17-18), but their sole authority for this proposition is June *1955* House floor discussion of an earlier bank holding company bill that did not include the Douglas Amendment and that was not enacted (Pet. 18 n.22). Such material sheds no light on the proper interpretation of the Douglas Amendment, which was not added until a year later. Nor does the House Banking Committee's report demonstrate—as petitioners claim (Pet. 17 n.21)—that Congress rejected a "regional approach to interstate banking." Indeed, the House initially adopted an even more restrictive *absolute* prohibition on interstate acquisitions (see pp. 10-11, above); the Senate thereafter effectively modified this absolute prohibition by enacting the Douglas Amendment and thus empowering the states to permit interstate acquisitions to the degree they choose.

[34]In fact, in considering the Amendment against the backdrop of the McFadden Act, Congress was well aware of the disparate policies that the states had adopted with regard to branch banking: Senator Douglas noted, for example, that his home state of Illinois prohibited branch banking altogether, while New York had divided itself into ten separate zones for branching purposes. 102 Cong. Rec. 6858 (1956).

permitted within their own borders.[35] The Connecticut and Massachusetts Acts are nothing more than legitimate exercises of this plenary authority that Congress conferred on the states.

II. The Board and the Courts Have Consistently Recognized the States' Plenary Authority under the Douglas Amendment.

Petitioners cite no precedent indicating that the Connecticut and Massachusetts Acts are beyond the scope of the states' authority under the Douglas Amendment. Nor is there any. On the contrary, *every* administrative and judicial decision construing the Amendment supports the conclusion that Connecticut and Massachusetts have authority under the Amendment to remove the general federal prohibition on interstate acquisitions of their local banks solely in accordance with their own policies, however selective those policies may be.

1. The respective decisions of Connecticut and Massachusetts to remove the Douglas Amendment's general prohibition only to a limited degree are by no means unique. Because banking long has been viewed as an intensely local matter, the states have exercised extreme caution and selectivity in lowering the Douglas Amendment's interstate barrier and thereby subjecting their local banks to the vicissitudes of interstate banking. The Board, fully cognizant of Congress' purpose in the Douglas Amendment, has always sustained the states' choices.

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[35]The extensive legislative history partially set forth here disposes of petitioners' claim (Pet. 17) that Congress, in enacting the Amendment, was not concerned "with any state action that might be taken" to remove the general prohibition on interstate bank holding company acquisitions. That legislative history also makes clear that this is not—despite petitioners' assertions (Pet. 22)—a situation in which congressional intent is sought to be derived from "isolated fragments of legislative history." Cf. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341-42 (1982) (reliance "on a *single* statement made on the floor of the House" (emphasis added)).

It was not until 1972 that one state—Iowa—enacted legislation effecting any removal of the Douglas Amendment's general interstate prohibition. Iowa's statute effectively authorized acquisition of Iowa banks by only *one* out-of-state holding company that had owned banks in Iowa prior to the Douglas Amendment's enactment.[36] In approving two subsequent interstate acquisitions by the "grandfathered" holding company, the Board expressly rejected the contention that "Congress did not intend to allow State legislatures to *choose selectively* which out-of-State bank holding company could enter the State."[37] "'State legislative judgments'" were recognized to be determinative.[38]

Subsequent Board decisions under the Douglas Amendment consistently have adhered to this principle. For example, Florida—much like Iowa—has enacted legislation permitting only three out-of-state bank holding companies that previously controlled Florida banks or trust companies to acquire additional Florida banks.[39] The Board has expressly held that this selective lifting of the Douglas Amendment's general prohibition is consistent with the grant of authority made to the states in the Amendment.[40] Delaware has chosen to permit entry by out-of-state bank holding companies only on economic terms highly favorable to itself and its local banks, including specific restrictions on the type of business that an out-of-state company's local affiliate may perform, the number of offices it may oper-

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[36]Iowa Code Ann. § 524.1805.

[37]*Northwest Bancorporation*, 38 Fed. Reg. 21530, 21531-32 (1973) (emphasis added).

[38]*Id.* at 21532.

[39]Fla. Stat. Ann. § 658.29(3)(d).

[40]*NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982). See also, *e.g.*, *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983) (approving interstate acquisition under Illinois statute effectively authorizing only a *single* Missouri-based bank holding company to acquire Illinois banks).

ate, the amount of capital it must maintain, and even the number of local employees it must have.[41] Nonetheless, the Board consistently has found this Delaware statute to satisfy the Douglas Amendment's requirement for purposes of interstate acquisitions within the State.[42] And the State of Washington has determined that it will permit interstate acquisitions only when necessary to save a failing local banking organization.[43] Again, the Board has found this very limited removal of the general federal prohibition to be entirely in accord with the Douglas Amendment.[44]

Only recently, the Board, in denying approval of an interstate acquisition that would have *contravened* the relevant state's policies, expressly acknowledged that it has "*consistently* construed the Douglas Amendment to authorize the states to limit or restrict entry by out-of-state holding companies" in removing the Amendment's general prohibition on interstate acquisitions.[45] The Board has never found such state selectivity to be impermissible. It has always given effect to Congress' essential intent in the Douglas Amendment "of allowing the

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[41]Specifically, Delaware law prescribes that an out-of-state holding company may control a Delaware bank only if the bank (1) is "operated in a manner and at a location that is not likely to attract customers from the general public," (2) operates "no more than a single office in this State," and (3) has a minimum of $25 million in capital and surplus and employs "not less than 100 persons" in the State within one year after commencing business. Del. Code Ann. tit. 5, § 803 (Supp. 1982).

[42]See *Citicorp*, 68 Fed. Res. Bull. 499 (1982); *Provident Nat'l Corp.*, 68 Fed. Res. Bull. 194 (1982).

[43]Wash. Rev. Code ch. 30.04.230(a).

[44]*BankAmerica Corp.*, 69 Fed. Res. Bull. 568, 569 (1983).

[45]*Bank of New York Co.*, 70 Fed. Res. Bull. 527, 528 (1984), rejecting argument that Connecticut, by authorizing acquisition of its banks by holding companies based in other New England states, had in fact removed the federal barrier for *all* out-of-state bank holding companies, regardless of their location.

states to apply their own policies . . . to the acquisition [of their local banks] by out-of-state bank holding companies . . . ."[46]

The present case merely involves another application of the established principle that Congress has purposefully given the states control over the acquisition of their local banks. Here, as in prior cases, the Board found no support for the claim that the challenged statutes' partial removal of the Douglas Amendment's general prohibition exceeds the states' authority under the Amendment (A71). Thus, this case does not present any novel issue under the Douglas Amendment or any departure from established Board precedent; rather, it is in accord with the Board's longstanding and consistent construction of the Amendment as affording the states plenary authority to remove the general prohibition on interstate acquisitions selectively, based on their own local policies. This longstanding administrative construction weighs heavily against the need for any further review by this Court.[47]

2. The courts which previously have construed the Douglas Amendment have—like the Board—consistently recognized the states' plenary authority under the Amendment.

Thus, in the *Iowa Independent Bankers* case, the District of Columbia Circuit, in sustaining the Board's approval of the "grandfathered" holding company's acquisitions under Iowa law (see p. 15, above), deemed it "obvious" from the legislative history that Congress' purpose in the Douglas Amendment was "to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that

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[46]*Id.* at 528. See also *First Bank System, Inc.*, Fed. Res. Bd. (Sept. 21, 1984) (op. at 9): "[T]he purpose and legislative history of the Douglas Amendment . . . reflect an intent to preserve the authority of the states over the structure of banking within their borders . . . ."

[47]Cf., *e.g.*, *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

such expansion *would not contravene state policy*."[48] Given this congressionally established principle of *state* supremacy in the area of interstate bank holding company acquisitions, the court rejected the contention that the states have authority under the Douglas Amendment only "to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely."[49] The court concluded that such a limiting construction would "rob" the states of their intended plenary authority to apply their own policies to interstate acquisitions of their local banks.[50]

The District of Columbia Circuit recently reaffirmed its determination in *Iowa Independent Bankers* that the states' authority under the Douglas Amendment is not limited.[51] Indeed, the court emphasized that in *Iowa Independent Bankers* the Douglas Amendment's legislative history was found to demonstrate "that Congress intended to allow a state to discriminate in admitting bank holding companies."[52] The court thus recognized once more Congress' intent that state policy should control entirely in this area.

This Court's previous construction of the Douglas Amendment also is consistent with the Board's and the lower courts' longstanding view that the states have plenary authority to remove the Douglas Amendment's general prohibition selectively in accordance with their own local policies. In the *Lewis* case, the Court clearly recognized that the Amendment authorizes the states "to create *exceptions*" to the general federal

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[48]*Iowa Indep. Bankers* v. *Board of Governors*, 511 F.2d 1288, 1297 (D.C. Cir.), *cert. denied*, 423 U.S. 985 (1975) (emphasis added).

[49]511 F.2d at 1296.

[50]*Id.* at 1297.

[51]*Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 615 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1708 (1984) (construing the International Banking Act in relationship to the Douglas Amendment).

[52]715 F.2d at 615.

prohibition on interstate acquisitions (see p. 11, above). Connecticut and Massachusetts have done precisely that in the present Acts.

The Acts are, in short, supported by every pertinent precedent construing the Douglas Amendment. Accordingly, the Second Circuit's application of the Douglas Amendment in this case presents no occasion for a grant of certiorari.

III. There Is No Conflict with This Court's Commerce Clause or Compact Clause Precedents.

Under this Court's decisions, Congress' grant of plenary authority to the states drains all substance from petitioners' Commerce Clause and Compact Clause claims. The court below plainly recognized this fact and thus was able to dispose of petitioners' constitutional objections in short order. Its decision presents no conflict with this Court's precedents that warrants any further review.

1. This Court has repeatedly held that Congress, in exercise of its plenary power over interstate commerce, may grant the states authority that they otherwise would not have to control an aspect of such commerce.[53] Any state action within the scope of such a congressional grant is "invulnerable to Commerce Clause challenge."[54] Only last Term, the Court established that "[t]here is no talismanic significance" to any particular test for determining when Congress has empowered the states to control a particular aspect of interstate commerce; rather, the essential inquiry simply is whether Congress has "unmis-

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[53]See, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, *supra*, 447 U.S. at 44; *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946); *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 315 (1945).

[54]*Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 653 (1981). Where Congress has granted states authority over an aspect of interstate commerce, the negative implications of the Commerce Clause—upon which petitioners entirely rely (*e.g.*, Pet. 14, 21)—have no more application to the states than they do to Congress itself. See 451 U.S. at 652-53.

takably" evidenced its intent that the states are to have such power.[55]

As the court below had no difficulty in concluding (A31), Congress plainly evidenced in the Douglas Amendment its intent to confer upon the states authority to control interstate commerce in the area of out-of-state holding company acquisitions of their local banks. In the Amendment, Congress purposefully put aside our general federal model because of strong concern over bank holding company expansion through interstate commerce to the detriment of local interests; Congress' clear intent was that the states should have authority to control the acquisition of their local banks in accordance with their own local policies (see pp. 10-13, above). This case thus involves precisely the sort of clear expression of "congressional policy" that the Court generally has sought.[56] To assert—as petitioners do—that ordinary Commerce Clause principles continue to apply to the states' regulation of out-of-state holding company acquisitions of their banks simply is to ignore Congress' express policy determination and to deny the states the very authority that Congress intended them to have.[57]

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[55]*South-Central Timber Dev. Co.* v. *Wunnicke*, 104 S.Ct. 2237, 2242 (1984); accord, *e.g.*, *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 304 (1953).

[56]See *South-Central Timber Dev. Co.* v. *Wunnicke*, *supra*, 104 S.Ct. at 2242.

[57]Petitioners (Pet. 6) imply that recent legislative proposals cast doubt on the scope of the state authority conferred by the Douglas Amendment. However, this Court has repeatedly stressed that "unsuccessful attempts at legislation" provide no reliable guide to Congress' intent, especially where, as here, the issue is the intent of a different Congress that acted years before the unsuccessful legislative effort. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981); *Fogarty* v. *United States*, 340 U.S. 8, 12-13 (1950). In fact, in addressing the principal recent proposal to amend the Douglas Amendment, the chief sponsor expressly acknowledged that Congress did "*not* intend to express or imply any disagreement with the second circuit's interpretation of the present Douglas amendment or otherwise suggest an opinion limiting the scope of authority conferred on the States in the original Douglas amendment nearly 30 years ago." 130 Cong. Rec. S11153 (daily ed. Sept. 13, 1984) (remarks of Senator Garn).

Petitioners argue (*e.g.*, Pet. 16), to be sure, that there is no evidence that Congress specifically contemplated state legislation that distinguishes among out-of-state holding companies in removing the Douglas Amendment's general prohibition on interstate acquisitions. But this Court has never held that a congressional grant of authority to the states, such as the Douglas Amendment, is limited by the particular types of state legislation that Congress expressly mentioned.[58] On the contrary, the Court established long ago that where Congress has made clear its intent to empower the states to control an aspect of interstate commerce, that grant of authority is "subject *only* to the exceptions *expressly* provided for."[59]

Consistently with this principle, the Court recently rejected an attempt to read into the McCarran-Ferguson Act—Congress' unrestricted grant to the states of authority over insurance—a limitation on discriminatory state action that Congress had nowhere expressed.[60] Congress having given the states full authority to regulate insurance without evidencing any intent to limit that authority, this Court refused to imply any such limitation.[61] As a result, petitioners' present argu-

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[58]The cases cited by petitioners (Pet. 18) reflect no such limitation: *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-60 (1982), and *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982), merely involved savings clauses that Congress had provided for *otherwise valid* state law; and in *South-Central Timber, supra*, 104 S.Ct. at 2243, Congress had not acted at all with respect to the relevant commerce.

[59]*Prudential Ins. Co.* v. *Benjamin, supra*, 428 U.S. at 431 (emphasis added).

[60]See *Western & S. Life Ins. Co.* v. *State Bd. of Equalization, supra*, 451 U.S. at 652-53. It was argued that the Court should read into the McCarran-Ferguson Act an exception for a retaliatory state tax that discriminated among out-of-state insurers; the Court could "find no such limitation in the language or the history of the Act." *Id.*

[61]See *id.* The court below properly followed the same approach in rejecting petitioners' contention that the court should read into the Douglas Amendment an exception prohibiting regional state statutes such as the present Acts (A29-A30).

ment—that the Douglas Amendment should be construed only to permit those forms of state legislation that Congress expressly contemplated—does not merely fail to demonstrate any conflict between this Court's Commerce Clause precedents and the decision below but, quite the contrary, is directly at odds with this Court's precedents.[62]

Indeed, this case presents even less of a Commerce Clause issue than any of the Court's prior decisions sustaining state legislation enacted pursuant to congressionally conferred authority. As the court below recognized (A29), the Connecticut and Massachusetts Acts do not restrain interstate commerce; they serve to promote it.[63] If the Acts were struck down, there would be no increase in interstate acquisitions of Connecticut and Massachusetts banks; on the contrary, the Douglas Amendment's general prohibition would control once more, and *no* such interstate acquisitions could occur.

Connecticut and Massachusetts have done nothing more than exercise their authority under the Douglas Amendment—as this Court stated in the *Lewis* case—"to *permit* expansion across state lines where it otherwise would be federally prohibited" (see p. 11, above).[64] The decision below

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[62]Petitioners' notion of minute specificity would, of course, be simply unworkable and would frustrate legitimate congressional efforts to grant the states authority to control a particular aspect of interstate commerce. Congress cannot be expected to anticipate the variety of policy choices that the states could make. See, *e.g.*, pp. 15-16, above. Nor is it important for Congress to have done so; rather, it is important only that Congress clearly evidences its intent to allow the states' policies to control in the relevant area, as it in fact did in the Douglas Amendment.

[63]Petitioners' tortured efforts to argue otherwise (Pet. 23) are patently specious; petitioners cannot avoid the fact that the Acts *facilitate* interstate acquisitions—such as those at issue here—that the Douglas Amendment otherwise would bar.

[64]Petitioners' claim (Pet. 21) that the Acts are particularly "objectionable" because they supposedly reflect "concerted action" by a group of states is sheer makeweight in light of Congress' grant of plenary authority to the

sustaining the States' action is entirely consistent with *Lewis* as well as the Court's other relevant Commerce Clause precedents.[65] There is, therefore, no need for review by this Court of petitioners' Commerce Clause claim.

2. Petitioners' Compact Clause claim has no more merit. This Court has consistently held that the Compact Clause applies only to "agreements that are 'directed to the formation of any combination *tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.*'"[66] Recognizing that the Compact Clause accordingly defines "the proper balance between federal and state power," the Court has established that "[t]he relevant inquiry must be one of impact on our federal structure."[67] The Connecticut and Massachusetts Acts plainly do

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states in the Douglas Amendment. In the first place, nothing in the Amendment's language or history precludes a state from acting, if it chooses, with other states in removing the general federal prohibition. Equally important, however, there is no finding of concerted action in this case: Connecticut and Massachusetts each individually passed its own statute, each individually administers its statute, and each remains free individually to repeal its statute at any time (see pp. 3-4, above).

[65]The decision below certainly presents no conflict (cf. Pet. 15, 16) with the *Lewis* Court's observation that "it is doubtful" that the Douglas Amendment "authorizes state *restrictions* of any nature on *bank holding company activities*," 447 U.S. at 47 (emphasis added). Neither Act imposes any new "*restrictions*" on bank holding company activities; each merely involves an exercise of the power that the *Lewis* Court expressly recognized the Amendment confers on the states—that is, the power "to create exceptions" to the general federal prohibition on interstate acquisitions. *Id.*

[66]*E.g.*, *New Hampshire* v. *Maine*, 426 U.S. 363, 369 (1976) (quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893)) (emphasis added).

[67]*United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). The very reason for the Compact Clause's requirement of congressional consent is "to check any infringement on the rights of the *national* government." J. Story, Commentaries on the Constitution ¶ 1403 (1833) (emphasis added).

not offend the Compact Clause as thus understood.[68]

The Court of Appeals conducted the "relevant inquiry" required by this Court's decisions and determined that the Acts do not "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States" (A32). Petitioners do not directly challenge that conclusion; nor could they reasonably do so.[69] The "proper balance between federal and state power" over interstate bank holding company acquisitions was established *by Congress* in the Douglas Amendment, which authorized the states to remove the federal bar to such acquisitions "to the degree" they so choose. The states' exercise of the authority expressly conferred by Congress plainly does not increase their political power vis-a-vis the federal government. As a result, the Connecticut and Massachusetts Acts pose no

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[68]In fact, the Connecticut and Massachusetts Acts do not involve an "Agreement or Compact" of any kind; each Act was a result of independent legislative action (see pp. 3-4, above).

[69]Petitioners' suggestion (Pet.27) that the Connecticut and Massachusetts Acts interfere with federal regulatory authority simply is untenable. In the Douglas Amendment, Congress *allocated* between the states and the Federal Reserve Board authority over interstate acquisitions, granting the Board the limited power to review acquisitions otherwise permitted by state law in order to ensure that such acquisitions generally are consistent with the public interest. See 12 U.S.C. § 1842 (requiring Board approval of both interstate and intrastate bank holding company acquisitions of banks). The states' exercise of their allocated authority plainly does not interfere with the Board's limited authority to review interstate acquisitions that state law expressly permits.

Nor do the Acts "undercut[] . . . federal policy" regarding the rescue of failing banks, as petitioners claim (Pet. 27 n.43, 28). Congress expressly excluded from the scope of the Douglas Amendment federally-assisted failing bank acquisitions and thereby unambiguously reestablished federal supremacy in this limited area. 12 U.S.C. § 1823(f)(4)(i). Accordingly, neither the Douglas Amendment nor the challenged state statutes would prohibit "New England bank holding companies from acquiring any [financially-troubled] non-New England banks . . . ."

substantial issue under this Court's settled Compact Clause precedents.[70]

Unable to present any viable Compact Clause claim under this Court's established "inquiry," petitioners assert alternative theories that are both irrelevant and misconceived. First, petitioners claim (Pet. 25) that the challenged statutes "act[] as a barrier to harmonious, voluntary cooperation among the states" and "prevent[] a uniform approach to interstate banking." That simply is not the case. The "barrier" about which petitioners complain was imposed *by Congress* in the Douglas Amendment in order to enable the states to apply their own disparate policies to interstate acquisitions of their own local banks (see pp. 10-14, above). Connecticut and Massachusetts merely have exercised their granted authority to remove the federal barrier to the degree consistent with their own local policies. No prior decision of this Court has held such congressionally authorized state action subject to the Compact Clause.

Second, petitioners complain (Pet. 26) that the Acts represent an "effort of Connecticut and Massachusetts to aggrandize themselves"—economically and politically—"at the expense of other States." However, in terms of any possible "economic" aggrandizement, this Court previously has confirmed that, unless the economic effect of challenged state action "transgresses the bounds of the Commerce Clause," the federal structure, with which the Compact Clause is exclusively concerned, is not implicated.[71] The Connecticut and Massachu-

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[70]Petitioners are flatly wrong in arguing (Pet. 27) that the Acts "creat[e] a new level of regulation." Neither Act creates any regional or multi-state regulatory authority; each state regulates interstate acquisitions of its local banks solely through its own existing bank regulatory authorities (see A99, A101-02). Thus, the Acts "neither project a new presence onto the federal system nor alter any state's basic sphere of authority." *United States Steel Corp.* v. *Multistate Tax Comm'n*, *supra*, 434 U.S. at 469 n.22.

[71]*United States Steel Corp.* v. *Multistate Tax Comm'n*, *supra*, 434 U.S. at 478.

setts Acts plainly satisfy this Court's Commerce Clause precedents (see pp. 19-23, above), and petitioners' theory of "economic" aggrandizement is therefore misconceived.

As for petitioners' claim of "political" aggrandizement, it is equally infirm. In a strained effort to link the commercial impact of the Connecticut and Massachusetts Acts to this Court's Compact Clause precedents, petitioners assert (Pet. 26) that the Acts are "at [their] core a political act" that increases the "political power of [New England] states to the detriment of the excluded states." But nowhere do petitioners explain (cf. Pet. 26) how any state's "political power" is in fact augmented by these statutes. Nor could they do so. Both Acts deal only with *private* corporate transactions, namely, interstate bank holding company acquisitions. Such legislation involves no threat to the sovereignty of any state—as the court below plainly recognized (A32).[72] Petitioners' theory of "political" aggrandizement is entirely illusory.[73]

Petitioners cite no case—nor is respondent aware of any—in which this Court has invalidated state legislation under the Compact Clause; and this case presents far less compelling grounds for review than those presented in any prior Compact

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[72]For this reason, petitioners' reliance on *dictum* in *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) is wholly misplaced. That decision, which affirmed the Supreme Court's original jurisdiction over state boundary disputes, merely observed that the parties could have resolved their differences by a compact approved by Congress. Boundary disputes undoubtedly threaten "the derangement of [the contending states'] federal relations with other states of the Union, and the federal government" because they concern the affected states' very sovereignty. *Id.* at 724. No such threat to any state's sovereignty in its federal relations with any other state or the federal government is presented by the Acts at issue here, which concern only private corporate transactions.

[73]In any case, the relevant inquiry under the Compact Clause is not whether the challenged state action constitutes a "political act;" rather, as this Court has held, "the test is whether the [Acts] enhance[] state power *quoad* the National Government." 434 U.S. at 473. As seen (pp. 24-25, above), the Connecticut and Massachusetts Acts plainly do not have such an effect.

Clause case decided by this Court. The Compact Clause serves to prevent the states from usurping federal authority (see p. 23, above). Here, Connecticut and Massachusetts have not even arguably done so; indeed, the relevant "balance between federal and state power" has been defined expressly by Congress in the Douglas Amendment. As a result, there is no reason for review of the Second Circuit's unanimous determination that the Connecticut and Massachusetts Acts do not violate the Compact Clause.[74]

3. In the final analysis, the decision below simply does not present any significant constitutional issue that warrants this Court's consideration.[75] The essential issue raised by petitioners—whether the acquisition of local banks by out-of-state bank holding companies should be subject to usual federal

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[74]Amicus Chase Manhattan also observes (Br. 19) that certain agreements among states have "been said to fall" under the Treaty Clause, Art. I, § 10, cl. 1, but it understandably refrains from arguing that any issue under the Treaty Clause has been properly presented to this Court or to the court below. See p. 8 n. 15, above; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (issues "neither raised before nor considered by the Court of Appeals" normally will not be considered). In any case, the Treaty Clause generally restrains state legislation only on subjects entrusted exclusively to the federal government, such as the power to negotiate treaties with foreign nations, to declare and wage war, and to coin money. See *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833), cited in *United States Steel Corp.* v. *Multistate Tax Comm'n*, *supra*, 434 U.S. at 466 n. 18; *Ford* v. *Surget*, 97 U.S. 594, 603 (1878). No such issue is even remotely presented here.

[75]Nor—despite petitioners' claims (Pet. 13)—is review required because the Board lacks "definitive guidance" as to the constitutionality of statutes such as the Connecticut and Massachusetts Acts. The Court of Appeals has fully addressed petitioners' claims, found them plainly untenable in light of the Douglas Amendment, and provided an "authoritative" judicial resolution (cf. Pet. 13) of the constitutional issues surrounding the Acts that is consistent with all prior precedent. Indeed, as petitioners acknowledge (Pet. 11-12), the Board only recently approved another interstate acquisition involving Massachusetts and Rhode Island banking organizations, resolving the constitutionality of the Rhode Island interstate statute without any difficulty in light of the decision below.

principles of economic unity rather than controlled by the states' own policies—is not a legal issue to be decided by this Court. It is an issue of national policy that Congress in fact already has resolved.

When Congress enacted the Douglas Amendment almost thirty years ago, it determined that state—not federal—policies should control the interstate acquisition of local banks. If Congress wishes to change that determination, it can do so, altering the structure of interstate bank regulation for the future. However, it plainly is not for the courts to rewrite the Douglas Amendment so as to preclude the states from applying their own policies—as Congress clearly intended—to the acquisition of their local banks by out-of-state holding companies. As the Federal Reserve Board itself only recently emphasized, "[s]uch a sweeping reinterpretation of the Douglas Amendment should appropriately be accomplished only by legislative action."[76]

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[76] *Bank of New York Co., supra*, 70 Fed. Res. Bull. at 528.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

GARY A. SPIESS
ROBERT L. KLIVANS
P.O. Box 1864
Boston, Mass. 02106

MARK A. WEISS
STUART C. STOCK*
GREGG H. LEVY
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel for Respondent Bank of Boston Corporation

* Counsel of Record

APPENDIX

Appendix A

1. Bank of Boston Corporation has no parent company.

2. Bank of Boston Corporation's partially owned subsidiaries and affiliates are as follows:

Alex Lawrie Computer Services Ltd.
Alex Lawrie Factors Ltd.
Alex Lawrie Receivables Financing Ltd.
Asesores Technico Administrativo, S.A. (Guatemala)
Banco de Boston Dominicano, S.A. (Dominican Republic)
Banco Del Ejercito, S.A. (Guatemala)
Banco Industrial S.A. (Guatemala)
Banco Latinoamericano de Exportaciones, S.A. (Panama)
Banco Latinoamericano de Exportaciones, S.A.
Big Canoe Corporation
Boston Bank Cameroon
Boston Industrial Lease (Queensland)
Boston Industrial Lease (S.A.)
Boston Leasing Limited
Boston Personal Reserve Insurance Company (Channel Islands)
Centrale de Livraison de Valeurs Mobilieres (Cedel S.A.) (Luxembourg)
Compania de Credito, S.A. (Honduras)
Confidential Invoice Discounting Limited
Confidential Invoice Factors Limited
Consolidated Leasing (Queensland)
Equila Particpacoese Empreendimento (Brazil)
Erato Transportation Inc. (Panama)
Euphrosyne Oceanic Transport S.A. (Panama)
Exteleasing, S.A. (Spain)
Factors A.G. (Switzerland)
First Leasing and Finance Ltd. (Australia)
First Leisure Corporation (United Kingdom)
Fundacion Dominicano de Desarollo (Dominican Republic)

IBJ Leasing Company, Ltd. (Japan)
Independent Factors Limited
Industrial Credit and Investment Corporation of India Ltd.
International Factors (Belgium)
International Factors Denmark A.S.
International Factors Espanola S.A. (Spain)
International Factors Group Holding S.A. (Luxembourg)
International Factors Ltd. (United Kingdom)
International Factors (Portugal) S.A.R.L.
International Lawrie Factors Holding, Ltd.
Inversiones Teatrales, S.A. (Honduras)
Nigerian American Merchant Bank Ltd.
Orient Factors (Hong Kong) Ltd.
Orient Factors Ltd. (Japan)
Pacific Lease (Hong Kong) Ltd.
Pacific Lease (Latin America) S.A. (Panama)
PLC Overseas Limited (Bermuda)
P.M.H. Boston (Brazil)
Primavera Country Club (Dominican Republic)
Private Development Corporation of the Philippines
Quissett Corporation
S.A. International Factors (Belgium)
Santo Domingo Tennis Club (Dominican Republic)
Servicios Comerciales e Industriales S.A. (Guatemala)
Societe Francaise de Factoring/International Factors France (France)
Sodril, S.A. (Brazil)
Sodril S.A. Correctora de Titulos e Valores (Brazil)
Tarjetas de Credito de el Salvador S.A.
Tarjetas de Credito de Guatemala S.A. (Guatemala)
Xenotron Limited (United Kingdom)

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No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
MICHAEL KIMMEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act (12 U.S.C. 1842(d)) authorizes a state to permit the acquisition of banks within its borders only by bank holding companies located in certain regions in the United States.

2. Whether such geographically restrictive state banking statutes, enacted under the authority of Section 3(d) of the Bank Holding Company Act, violate the Commerce Clause or Compact Clause of the Constitution.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A33) is reported at 740 F.2d 203. The three orders of the Federal Reserve Board at issue in this case (Pet. App. A34-A71, A72-A78 and A79-A87) are reported at 70 Fed. Res. Bull. 374, 353 and 524.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1984. The petition for a writ of certiorari was filed on September 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Section 3(d) of the Bank Holding Company Act (BHCA) (12 U.S.C. 1842(d) (the "Douglas Amendment")) generally bars a bank holding company that has its principal place of business in one state from acquiring a bank located in another state. But such interstate transactions are permissible under the Douglas Amendment when "the acquisition of * * * a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

In late 1982 the Massachusetts legislature enacted a statute (the "Massachusetts Act") that permits the acquisition of Massachusetts banks by out-of-state bank holding companies.[1] The statute contains a significant limitation, however: it authorizes such interstate acquisitions only if the acquiring bank holding company is located in another New England state (that is, in Connecticut, Maine, Rhode Island, Vermont or New Hampshire).[2] On June 8, 1983, Connecticut enacted a similar statute (the "Connecticut Act"),[3] which authorizes the acquisition of Connecticut banks by holding companies based in the other

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[1] The Massachusetts Act (Mass. Ann. Laws ch. 167A, § 2) (Law. Co-op. 1977 & Supp. 1984)) is reprinted at Pet. App. A101-A102.

[2] The statute also contains a reciprocity provision: it permits the acquisition of Massachusetts banks by out-of-state holding companies only when the home state of the acquiring company grants reciprocal acquisition rights to Massachusetts bank holding companies.

[3] The Connecticut Act (1983 Conn. Acts 83-411 (Reg. Sess.)) is reprinted at Pet. App. A97-A100.

five New England states.[4] Since the enactment of the Connecticut Act, statutes authorizing regional interstate banking have been enacted in seven states; similar statutes have been proposed in at least five other states. See page 12, *infra*.

2. Following the enactment of the Massachusetts and Connecticut Acts, three sets of Massachusetts and Connecticut bank holding companies agreed to merge.[5] These companies then applied to the Federal Reserve Board for approval of the transactions, as required by the BHCA. See 12 U.S.C. 1842(a). The applications were opposed by the petitioners in this case, New York and Connecticut bank holding companies and a Connecticut bank,[6] which argued that the Massachusetts and Connecticut Acts authorizing the acquisitions violate the Commerce (Art. I, § 8, Cl. 3) and Compact (Art. I, § 10, Cl. 3) Clauses of the Constitution.

The Board nevertheless approved the applications (Pet. App. A34-A71, A72-A78, A79-A86). It read

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[4] Rhode Island enacted a similar provision (1983 R.I. Pub. Laws S.0661) in May 1983, although the regional restriction in the Rhode Island act expires on July 1, 1986 (see Pet. App. A103-A106).

[5] Respondent Bank of New England Corporation, a Massachusetts bank holding company, agreed to merge with respondent CBT Corporation, a Connecticut bank holding company; respondent Hartford National Corporation, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, Inc., a Massachusetts bank holding company; and respondent Bank of Boston Corporation, a Massachusetts bank holding company, agreed to acquire Colonial Bancorp, Inc., a Connecticut bank holding company (Pet. App. A22).

[6] Separate applications were presented to the Board concerning each of the proposed New England transactions. On appeal, the court of appeals consolidated the challenges to the three applications (Pet. App. A26-A27).

the Massachusetts and Connecticut Acts as falling within the literal terms of the Douglas Amendment by "meet[ing] the requirement of express authorization for interstate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act" (Pet. App. A37). The Board then concluded that "there is no clear and unequivocal basis for a determination" that the Acts are inconsistent with the Commerce or Compact Clauses (Pet. App. A37, A74-A75, A83).[7]

The court of appeals upheld the Board's orders. The court of appeals reasoned that the Massachusetts and Connecticut Acts "specifically authorize acquisitions" of in-state banks by out-of-state holding companies and therefore are supported by the Douglas Amendment (Pet. App. A29). This conclusion disposed of petitioners' Commerce Clause argument, the court continued, because "Congress may authorize the states to enact statutes which may interfere with interstate commerce" (Pet. App. A30), and "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). The court found the state Acts consistent with the Compact Clause because the New England banking arrangement does not "encroach upon or interfere with the just supremacy of the United States" (Pet. App. A32).[8]

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[7] The Board also found that the acquisitions met the traditional competitive, financial and managerial standards set out in Section 3(c) of the BHCA (12 U.S.C. 1842(c)). See Pet. App. A41-A48, A75-A78, A80-A86. These determinations are not challenged here.

[8] The court of appeals also rejected a challenge to the Massachusetts and Connecticut Acts based on the Equal Protection Clause (Pet. App. A32-A33). That challenge is not repeated here.

ARGUMENT

1. Several propositions that control the analysis of this case seem clear. In the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause. See generally *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976). Conversely, Congress plainly may authorize the states to regulate interstate commerce in ways that otherwise would be inconsistent with the Clause. See generally *Western & Southern Life Ins. Co.* v. *Board of Equalization*, 451 U.S. 648, 652-653 (1981); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427-432 (1946). Finally, agreements between the states violate the Compact Clause only if they impinge upon an interest of the federal government. See *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 467 (1978). Thus the principal question in this case is whether Congress in the Douglas Amendment authorized the states to enter into regional banking arrangements.

a. While the issue is not entirely free from doubt, we believe that the court of appeals correctly answered this question in the affirmative. Petitioners maintain that the Douglas Amendment should not be read to authorize state enactments that "discriminate against or unduly burden interstate commerce" (Pet. 19 & n.24). But as both the Board and the court of appeals noted, the Massachusetts and Connecticut Acts appear to fall within the literal terms of the Douglas Amendment (Pet. App. A29, A37). The state Acts at issue here plainly are "statute laws"

that "specifically authoriz[e]" the acquisition of "a State bank by an out-of-State bank holding company." 12 U.S.C. 1842(d). And the state Acts undoubtedly were intended to authorize the transactions challenged in this case.

The sparse legislative history of the Douglas Amendment does not directly address the question whether Congress intended to authorize the creation of regional banking arrangements, and therefore does little to illuminate the meaning of the statutory language. Congressional attention during the debate on the Amendment[9] was focused on the provision's creation of barriers to interstate banking (see 102 Cong. Rec. 6862 (1956) (remarks of Sen. Morse); *id.* at 6861 (remarks of Sen. Bricker); *id.* at 6860 (remarks of Sen. Douglas)); there was little attention given to the scope of the power granted states to overcome those barriers. The relevant discussion therefore consists in large part of conclusory statements by Senator Douglas to the effect that his Amendment would "permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them" (*id.* at 6858), would "prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so" (*id.* at 6859), or would leave room for the exercise of "State policy" in the banking field (*id.* at 6860). But there was no congressional discussion of the specific types of action that the states might or might not take under the Douglas Amendment.[10] See *Iowa Independent*

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[9] Because the Amendment was adopted on the Senate floor (see 102 Cong. Rec. 6856-6863 (1956)) there is no committee report to explain the Amendment's meaning.

[10] Petitioners cite congressional statements urging that the BHCA be applied in a nondiscriminatory way (Pet. 18 n.22).

Bankers v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975).[11]

In short, nothing in the legislative history establishes that the unqualified language of the Douglas Amendment does not mean what it says. In these circumstances, the Court should defer to the Board, which rejected petitioners' suggestion that the bank acquisitions challenged in this case were plainly outside the contemplation of Congress when it enacted the Douglas Amendment (see Pet. App. A41, A67). See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8.

b. Petitioners also contend that the Douglas Amendment should not be read to validate the Massachusetts and Connecticut Acts because, under this Court's holdings, "an Act of Congress should not be construed to abrogate the limitations imposed on states by the Commerce Clause unless the federal law

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But these statements were not directed to the Douglas Amendment; the cited remarks were made 10 months before the Amendment was proposed and concerned exceptions to the regulatory aspects of the bill.

[11] This Court's only discussion of the Douglas Amendment is equally brief. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis in original), the Court noted that "[t]he only authority granted to the States [in the Amendment] is the authority to create exceptions to th[e] general prohibition [on interstate banking], that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." These comments were made in response to a claim that the Amendment validated state restrictions on the non-banking activities of out-of-state bank holding companies. See *ibid.* It is impossible to draw from this discussion, as do petitioners, the proposition that the Amendment does not permit states to "form regional alliances" in the banking field (Pet. 15-16).

unmistakably authorizes the state conduct at issue" (Pet. 18). The Douglas Amendment fails to provide such authorization, petitioners assert, because it does not declare "that states were authorized to discriminate among their sister states" (Pet. 15). Given the unusual nature of the challenged arrangements in this case—which explicitly create combinations of states that seemingly were designed for the purpose of excluding other states (see Pet. 4-5 & n.6)—this argument is entitled to serious consideration.[12] Again, however, on balance we believe that petitioners' contention fails to carry the day.

It is of course true that, as this Court has noted, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Dev., Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 9. But the decisions in which the Court has applied this doctrine have little bearing here. Those decisions came in cases where states sought to find federal authorization for restrictive state conduct by looking to federal policy in analogous areas (*e.g.*, *South-Central Timber*, slip op. 6-10)[13] or by pointing to "standard nonpre-emption clause[s]" in federal enactments (*e.g.*, *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342-343

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[12] Thus we note that the New England states could have prevented their banks from being dominated by large out-of-state bank holding companies (see Pet. 4-5 & n.6) by using methods that "discriminated" less overtly against other states qua states—for example, by preventing in-state acquisitions by bank holding companies over a certain size.

[13] In *South-Central Timber*, Alaska tried to justify restrictions on the sale of timber from state lands by pointing to sim-

(1982)). In such cases the Court has declined to "rewrite [congressional] legislation based on mere speculation as to what Congress 'probably had in mind.'" *Id.* at 343 (citation omitted). Taking this tack assures that Congress "affirmatively contemplate[d] otherwise invalid state legislation" when it took the action said to authorize such state activity. *South-Central Timber*, slip op. 9.

Here, however, despite the sparse legislative history, there is no doubt that the state enactments at issue fall within the literal language of the Douglas Amendment. And while Congress did not address in detail the nature of the authorized activity, it realized that it was allowing the states to involve themselves in the regulation of interstate commerce and that the language of the Douglas Amendment did not expressly restrict the nature of that regulation. See 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas); *ibid.* (remarks of Sen. Bennett). Cf. *BT Investment Managers*, 447 U.S. at 47.[14] Accordingly, there is no reason to believe that the Douglas Amendment is an insufficiently "clear expression of

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ilar restrictions on the sale of timber from federal lands in the state. The Court concluded that "[t]he fact that state policy * * * appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands." Slip op. 10.

[14] Indeed, the Court has read analogous legislation to allow the states to take action that otherwise would violate the Commerce Clause. See, *e.g.*, *Western & Southern*, 451 U.S. at 653; *Prudential Ins. Co.*, 328 U.S. at 427-432.

approval by Congress." *South-Central Timber*, slip op. 9.[15] See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

c. This conclusion should suffice to dispose of petitioners' Commerce Clause contentions. Congress " 'may redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.' " *South-Central Timber*, slip op. 5, quoting *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).[16] And once "Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern*, 451 U.S. at 652-653. Because the Douglas Amendment authorizes the Massachusetts and Connecticut Acts, those statutes are immune from Commerce Clause attack.

d. Petitioners' Compact Clause argument is similarly unpersuasive. That Clause invalidates " 'agree-

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[15] The breadth of the statutory language has special significance in this case. When Congress enacted the Douglas Amendment, it acknowledged that banking historically has been a subject of special concern to states and localities, and it recognized that states always have played a significant role in the regulation of the banking industry. See 102 Cong. Rec. 6857-6858 (remarks of Sen. Douglas); *id.* at 6860 (remarks of Sen. Douglas); *id.* at 6862 (remarks of Sen. Morse). See also *Iowa Independent Bankers*, 511 F.2d at 1296. Given this background, it would be particularly inappropriate here to search for implicit limitations in Congress's unqualified grant of regulatory authority to the states.

[16] We do not understand petitioners to contend that Congress lacks the power under the Commerce Clause to authorize the creation of regional banking arrangements. See Pet. 21-22.

ments that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." '" *Multistate Tax Comm'n*, 434 U.S. at 471, quoting *New Hampshire* v. *Maine*, 426 U.S. 363, 369 (1976), in turn quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). Here—even assuming that the New England banking arrangement constitutes a "compact" within the meaning of the Clause—the Massachusetts and Connecticut Acts are in no way inconsistent with federal supremacy or "hostile" to "federal concerns." *Multistate Tax Comm'n*, 434 U.S. at 488, 489 (White, J., dissenting). To the contrary, the Board has interpreted the Douglas Amendment "as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52). That interpretation "'is entitled to the greatest deference.'" *Securities Industry Ass'n*, slip op. 8, quoting *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 (1981). And in the absence of any federal interest, a state enactment hardly can threaten federal supremacy.

2. While the decision below is correct, whether the Court should grant certiorari nevertheless is a close question. The issues presented by this case are of considerable practical importance and are likely to be raised in other circuits.[17] Their immediate resolution

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[17] Litigation on the validity of banking regions is likely to proceed in Circuits other than the Second. As noted above, banking regions are being created around the nation; petitioner Citicorp, meanwhile, represents that it "has challenged each interstate bank transaction that has come before the Board under the purported authority of a regionally restrictive statute" (Pet. 11 n.14).

by the Court might therefore put to rest significant uncertainties about the future development of the nation's banking system. In addition, this case presents issues concerning the basic relationship of the states to one another, of the sort that this Court often has addressed. On balance, however, we believe that application of the traditional criteria guiding this Court's discretionary review should lead to denial of the petition.

a. The practical importance of the court of appeals' decision is manifest: if the decision is allowed to stand (and if it is not modified by legislation) it might well lead to a significant restructuring of the banking industry as other states follow the lead set by the New England states. Florida, Georgia, South Carolina and North Carolina already have enacted legislation creating a southeastern banking region similar to the one established in New England by the Massachusetts and Connecticut Acts. Utah and Kentucky also have enacted regionally restrictive banking statutes, and it appears that a number of other states are considering similar legislation (see Pet. 10-11 & n.13). Furthermore, a number of intra-region mergers in both the New England and southeastern regions already have been announced or proposed (see Pet. 11; Pet. App. A245; Br. of Amicus Curiae Chase Manhattan Corp. 6-7 n.4). According to the Board, these trends "suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation" (Pet. App. A38).

These practical considerations suggest that, if the Court believes that it eventually will become necessary to address the issues presented here—either because of their importance, or because of the pos-

sibility that a conflict among the circuits will develop—doing so in this case would be wise. It is reasonable to assume that state legislatures and bank holding companies will rely on the validity of the Second Circuit's decision; if this Court were to repudiate the court of appeals' holding in a future case, a large segment of the banking industry may well have invested considerable resources in pursuing constitutionally infirm activity. In such circumstances, an authoritative decision by the Court in advance of this widespread activity would be of substantial public benefit. Furthermore, a ruling contrary to that of the decision below necessarily either would disturb a number of consummated transactions or, if not made retroactive (see *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971)), would leave in place an imbalance in the degree of interstate banking permitted in various states or regions of the country depending upon fortuities such as the timing of the authorizing state legislation, of Board action, and of the consummation of any approved transactions.[18]

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[18] It is worth noting, however, that petitioners have offered no principle that would allow a court to read into the Douglas Amendment the type of implicit limitation that they contend for here but would not also call into question the validity of other state statutes that authorize only a limited degree of interstate banking. Thus the practical effects of a reversal of the Second Circuit's decision would be both narrower and broader than petitioners suggest. Such a decision would not increase the flow of interstate commerce; to the contrary, by limiting the ways in which states could avoid the prohibitory language of the Douglas Amendment, a reversal would significantly curtail the total volume of interstate banking. In particular, a decision in their favor would not permit petitioners to consummate their planned mergers with or acquisi-

b. Despite the importance of this case to the banking industry, we cannot conclude that further review is warranted at this time. While the issues raised are of practical significance, the question presented involves the meaning of a statute rather than of the Constitution (see Pet. App. A196-A197, A198-A200 (statements of Paul A. Volcker), A201-A204 (statement of Emmett J. Rice)). Although petitioners dress their arguments in constitutional clothing, there is no basic disagreement among the parties about the meaning of the Commerce or Compact Clauses; at bottom, this case presents only a relatively straightforward question of statutory interpretation, of the sort that the Court usually does not decide in the absence of a conflict among the circuits.

Here, of course, no such conflict exists. To the contrary, the District of Columbia Circuit—which apparently is the only court of appeals other than the Second Circuit that has addressed the nature of the Douglas Amendment's authorization of state activity—has concluded (in the context of an equal pro-

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tions of banks in other states (see Pet. 3). Conversely, a holding that the Douglas Amendment does not authorize state-imposed restrictions that otherwise would be violative of the Commerce Clause would open to challenge a range of state laws in addition to the regionally-restrictive ones in this case—for example, laws that permit the acquisition of an in-state bank by an out-of-state holding company only when the home state of the acquiring company grants reciprocal acquisition rights to in-state holding companies (see, *e.g.*, N.Y. Banking Law § 142-b (McKinney Supp. 1983)), or laws that permit the entry of out-of-state holding companies into a state only in certain restricted circumstances (see, *e.g.*, Ill. Ann. Stat. ch. 17, §§ 2510, 2710 (Smith-Hurd 1981); Iowa Code Ann. § 524.1805 (West Supp. 1984); S.D. Codified Laws Ann. § 51-16-40 (Supp. 1984)).

tection challenge) that "the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy." *Iowa Independent Bankers*, 511 F.2d at 1297. See *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), cert. denied, No. 83-954 (Apr. 2, 1984) (the Douglas Amendment "empowered states to discriminate among out-of-state bank holding companies when deciding which could enter"). Our conclusion that there is no present reason to anticipate the development of a conflict among the circuits is based in substantial part on our conclusion that the decision below is correct.

Finally, there is at least a possibility that the questions presented here will be mooted by legislation. Congress recently has considered proposals relating to regional and interstate banking (see Pet. App. A205-A207 (statement of C.T. Conover) (outlining legislative proposals); H.R. 2431, 98th Cong., 1st Sess. (1983)). Indeed, on September 13, 1984, the Senate passed a bill (S. 2851, 98th Cong., 2d Sess.) that would have authorized states to enact regional bank acquisition legislation for a period of five years; the House took no action on the provision before Congress adjourned. There is some indication that the issue will be considered again in the next session of Congress (see 130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984) (statement of Rep. St. Germain)), although congressional action is far from assured.

There is little doubt, however, that the issues raised by petitioners are better suited to legislative than to

judicial resolution. As noted, these issues are ones solely of statutory interpretation. Indeed, this case is but one aspect of a larger controversy involving the degree to which interstate banking is desirable and the methods that might best be used to increase competition in the banking industry. In deciding this case, however, the Court, unlike Congress, would be unable to address the nuances of those issues; its decision could resolve only the narrow question whether the Douglas Amendment permits states to authorize particular types of interstate banking. And in resolving that question the Court would be limited to ascertaining the intent of Congress in 1956—at the same time that the current Congress is considering more recent developments in the banking industry while grappling anew with the issues presented by interstate banking. See *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984), slip op. 11.

These factors lead us to conclude that this case does not meet the usual criteria justifying a grant of certiorari. The case presents a narrow, albeit important, issue of statutory construction, the issue was correctly resolved by the court of appeals, there is no disagreement among the lower courts, and the matter may well be addressed by new legislation. In these circumstances, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
ANTHONY J. STEINMEYER
MICHAEL KIMMEL
Attorneys

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No. 84-363

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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amicus Curiae
Two World Trade Center
New York, New York 10047
(212) 488-5745

ROBERT HERMANN
Solicitor General of the
State of New York

R. SCOTT GREATHEAD
First Assistant Attorney General

JUDITH T. KRAMER
Assistant Attorney General

DERRICK D. CEPHAS
Deputy Superintendent of
Banks and Counsel

MICHAEL SCHUSSLER
Assistant to the Superintendent
Of Counsel

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NORTHEAST BANCORP, INC.,
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Petitioners,

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— *and* —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

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AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Interest of the *Amicus Curiae*

This brief *amicus curiae* is respectfully submitted pursuant to Rule 38.4 of this Court on behalf of the State of New York in support of the petition for writ of certiorari.

At issue in this case is the constitutionality of statutes recently enacted by Massachusetts[1] and Connecticut[2] (collectively, the "New England Compact"), which effectively establish an exclusive banking region wherein banks which do not maintain their principal place of business in New England are barred from gaining entrance to the New England banking market. These statutes are manifestly harmful to the interests of the State of New York.

There can be no doubt that the principal targets of this discriminatory scheme are New York banking institutions. The author of the Massachusetts statute, Massachusetts State Senator John A. Brennan, Jr., has all but conceded this:

> "I just didn't think it would be good for the state if the big money center banks came in here." (A 189).

Connecticut State Senator Sullivan, in urging enactment of that state's exclusionary statute, spoke of "the large New York banks", the "fear that they would come into Connecticut," and the need "to get our New England financial institutions in a position where they can withstand the assault of the big money markets." (A 159-60).

To characterize New York as a "big money center" is correct. New York is the financial center of the United States. The financial services industry—comprised of banking, insurance, securities and related institutions—is one of New York's most important industries, employing more than one half million people. Indeed, financial serv-

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1. Mass. Gen. Laws Ann. ch. 167A §2 (West 1971 & Supp. 1984) (A 101-102). (Numbers in parentheses refer to Petitioner's Appendix).

2. 1983 Conn. Act 83-411 (A 97-99).

ices—and particularly banking—are to New York what corn is to Kansas, coal to West Virginia, oil and cattle to Texas.

Although New York is the headquarters of many large banks, it is also the principal place of business of many small banks. The statutes at issue in this case discriminate against *all* New York banks, regardless of size or financial power. Thus, while the articulated rationale supporting the New England Compact cites the need for local control over banking interests and the need to preserve a decentralized banking system in New England, its effect is quite different. Under the New England Compact, a very large bank located in Boston would be permitted to acquire a small, local bank located in rural northwestern Connecticut, although the banks have neither geography nor economic interests in common. The largest bank in Connecticut could merge with the largest bank in Massachusetts. Yet two small banks located a few miles apart in rural areas and serving the same general population—one in upstate New York and the other in western Massachusetts—would not be permitted to merge. Similarly, two small or medium sized banks serving suburban communities—one headquartered in Fairfield County, Connecticut and the other headquartered in neighboring Westchester County, New York—would be prevented from combining.

In short, it is obvious that the primary purpose of the New England Compact is simply to exclude any New York bank—large or small, located upstate or in New York City—from participating in the banking business in New England. This blanket exclusion obviously harms New York banking institutions by depriving them of access to the New England banking market. It also harms New York residents who would benefit from the increased competition,

improved services and lower costs resulting from interstate acquisitions. And it even more fundamentally harms the interests of New York State by denying one of its most vital industries the benefits of free and unencumbered interstate commerce intended by the Framers.

Statement of the Case

Amicus hereby incorporates by reference the Statement of the Case contained in the petition for a writ of certiorari.

Reasons for Granting the Writ

The petition for a writ of certiorari presents novel questions of law of substantial importance to banking institutions, state and federal bank regulators and consumers of banking services.

There is little question that the Connecticut and Massachusetts statutes are openly protectionist, anti-competitive and a substantial burden on interstate commerce.[3] The Second Circuit correctly observed that such state laws vio-

3. When a state restrains commerce in a manner that is openly protectionist, the Court has applied a *per se* rule of unconstitutionality. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). Where the burden imposed by a state statute is an evenhanded and incidental one necessitated by a legitimate local concern, a balancing test is employed and the statute held constitutional only if the burden imposed on interstate commerce is not disproportionate to the local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The New England Compact fails both tests. A more blantantly protectionist scheme could hardly be imagined. Moreover, as the Federal Reserve Board found, "there are less restrictive means than a discriminatory geographic restriction to accomplish the objectives" of the Connecticut and Massachusetts legislatures (A 60).

late the Commerce Clause absent "clear" congressional authorization (A 30). However, we believe that the court below erred when it found such authorization in Section 3(d) of the Bank Holding Company Act—the so-called Douglas Amendment (A 31).

The decision of the court below does not elaborate on the basis for this finding. Indeed, some uncertainty about its holding is apparent from the fact that the court expressed it as a "belief":

> "We *believe* that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here." (A 31). (Emphasis added).

The language of the Douglas Amendment falls far short of supporting the Second Circuit's "belief" that Congress intended to authorize states to discriminate against their sister states, as Massachusetts and Connecticut have done. This Court has observed that the object of the Douglas Amendment was much narrower:

> "Preliminarily, it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."
>
> *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980). (Emphasis in original; footnote omitted).

Nor does the scant legislative history of the Douglas Amendment evince any congressional intent to authorize dismriminatory regional alliances. As the court below noted, at the time the amendment was enacted *no* state permitted its banks to be acquired by foreign state bank holding companies (A 28). Thus, in the words of Senator Douglas, the effect of the amendment would be "to bar the expansion of bank holding companies across State lines" while permitting States "to make explicit provision for such purchases and acquisitions if they so decided." (A 28-29).

When the Federal Reserve Board considered the constitutionality of these laws, it acknowledged that "[t]he Douglas Amendment does not appear *on its face* to authorize discrimination," and that "there is no committee report or other significant legislative history to clarify its meaning." (A 65, 66, emphasis in original). Although it rejected the petitioners' constitutional challenges to the Connecticut and Massachusetts laws, the Board acknowledged that it had "a limited amount of judicial guidance on the issue." (A 67).

The need for judicial guidance was not met by the conclusory decision of the court below. On the contrary, to the extent that the Second Circuit has supplied any guidance at all, its finding that the Douglas Amendment authorized the New England Compact is inconsistent with this Court's holdings.

This Court has held that states may not regulate commerce in a way that would otherwise violate the Commerce Clause absent a grant of congressional authorization that

is "unmistakably clear." *South Central Timber Development, Inc.* v. *Wunnicke,* —— U.S. ——, 104 S. Ct. 2237, 2242 (1984). See, *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982). Congressional intent to grant such authority must be "expressly stated". *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 427, 431 (1946). "Mere speculation as to what Congress 'probably had in mind' " is not sufficient to overcome the proscriptions of the Commerce Clause. *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982).

The scheme devised by Massachusetts and Connecticut is by its plain terms inimical to the vision of free and unencumbered interstate commerce held by the Framers of the Constitution. Absent congressional authorization that is clear and unequivocal, it must fall. The only such authority that has been proffered is the Douglas Amendment. For the reasons stated above, we do not believe such authority exists in the Douglas Amendment.

Nor do we believe that the Second Circuit was correct in holding that the New England Compact did not violate the Compact Clause. The enactment of reciprocal, exclusive legislation and the consistent cooperation between the states of Massachusetts and Connecticut in this matter (A 153-168) leave little doubt about the existence of a compact. See, *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 470 (1978); *Virginia* v. *Tennessee,* 148 U.S. 503, 517-518 (1893). The Second Circuit's holding that this is not an unconstitutional compact, one that would increase the power of the New England States or encroach upon the supremacy of the United States, belies logic. The New England Compact will profoundly affect

the interstate banking system, an area of great interest to and extensively regulated by the federal government, and it will do so at the expense of New England's sister states. We believe that this is precisely the sort of scheme the Compact Clause was meant to bar.

Finally, the Second Circuit's reliance on the Federal Reserve Board's conclusion regarding the constitutionality of the Massachusetts and Connecticut statutes is misplaced. The Federal Reserve Board, an admittedly reluctant arbiter of constitutional issues (A 40), employs a narrow standard of review of its own devising. It will not "hold a state statute to be unconstitutional without clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution". *NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982). Needless to say, a judicial determination ought not to rest on so limited a review. As the Federal Reserve Board stated in its brief before the Court of Appeals, "While the Board has initially considered the constitutional questions raised by the Connecticut and Massachusetts statutes, it is ultimately for the courts to decide such issues." (A 195). This plea for judicial scrutiny went unanswered in the Second Circuit and needs to be addressed by this Court.

The need for a prompt and definitive review by this Court is made more urgent by the rapid proliferation of regional banking compacts throughout the country. The states of Georgia and Utah recently enacted statutes similar to those in question here, and the legislatures of approximately 15 other states are giving serious thought to enacting similar legislation. (See Petitioners' Brief at 10-13). If the Second Circuit decision is allowed to stand without

review, it can only presage conflicting decisions in the various circuits and the prospect of undoing complicated mergers and acquisitions if these statutes are ultimately held to be unconstitutional.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
November 8, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amicus Curiae

ROBERT HERMANN
Solicitor General of the
State of New York

R. SCOTT GREATHEAD
First Assistant Attorney General

JUDITH T. KRAMER
Assistant Attorney General

DERRICK D. CEPHAS
Deputy Superintendent of
Banks and Counsel

MICHAEL SCHUSSLER
Assistant to the Superintendent
Of Counsel

No. 84-363 (10)

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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

JOHN BOYER
GREGORY SCOTT MERTZ
CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

The Solicitor General's brief demonstrates compellingly the need for review by this Court at this time. He acknowledges that "an authoritative decision by the Court . . . would be of substantial public benefit," and states that "if the Court believes that it eventually will become necessary to address the issues presented here—either because of their importance, or because of the possibility that a conflict among the circuits will develop—doing so in this case would be wise." Board Opp. 11.

The Solicitor General's ground for hesitation in urging further review is that the decision below, although not "free from doubt," is "correct." *Id.* at 4, 13. Nevertheless, he acknowledges the force of petitioners' assertion that the Douglas Amendment does not explicitly permit states "to discriminate among their sister states." *Id.* at 7. He adds that, in view of the "unusual nature of the challenged arrangements in this case—which explicitly create combinations of states that seemingly were designed for the purpose of excluding other states—[petitioners'] argument is entitled to serious consideration." *Id.* at 7.

In this brief, we address the Solicitor General's arguments and reply to the contentions of the other respondents, which largely mirror the views expressed by the Solicitor General. We sharply disagree with the Solicitor General's view that this case presents "only a relatively straightforward question of statutory interpretation." Board Opp. 12. The Solicitor General acknowledges that "[i]n the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause." *Id.* at 4. And, as the Solicitor General himself stated last Term in his brief (p. 9) in *South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S. Ct. 2237 (1984): "The requirement of explicit congressional approval for discriminating state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from parochial discrimination. . . . It assures that the national legislative process will afford the representatives of the

burdened interests a clear opportunity to voice their views."

Under the court of appeals decision, the door is open to discriminatory multi-state arrangements that conflict with the national interests embodied in the Commerce Clause, as well as the Compact Clause, with the clear and present danger of interstate divisiveness and economic retaliation by boycotted states. The *amicus curiae* brief filed by the State of New York provides eloquent testimony that allowing one group of states to boycott another will have far-reaching consequences for the economic welfare of the Nation.

1. The Douglas Amendment Has Not Unmistakably Authorized States To Adopt Regionally Discriminatory Legislation

a. Although the Solicitor General and the other respondents contend that the Douglas Amendment authorizes states to form regionally discriminatory combinations, they cannot agree on where such authorization is to be found. The intervenor-respondents, on the one hand, argue that the "legislative history" supplies such evidence. CBT Opp. 11-14. The Solicitor General, on the other hand, properly refutes that contention, observing that the "sparse legislative history" does not "address the question whether Congress intended to authorize the creation of regional banking arrangements." And, like the Board, he rejects the relevance of "conclusory statements" in the legislative history. Board Opp. 5; Pet. App. A66.

The Solicitor General nonetheless asserts that the "literal terms of the Douglas Amendment" authorize such discrimination, reasoning that "the State Acts at issue here plainly are 'statute laws' that 'specifically authorize' the acquisition." Board Opp. 5. In so arguing, the Solicitor General contradicts the Board. The Board conceded that "the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states . . ., but against all other states." The Board also admitted that the "general" language of

the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court." Pet. App. A65 (emphasis in original).

The language of the Douglas Amendment discloses nothing that suggests that Congress unmistakably intended to give the states power to form discriminatory regional boycotts, or that Congress meant to waive the protections of the Commerce Clause. The Douglas Amendment empowers the Board to approve interstate bank acquisitions if "the acquisition of . . . a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d). The language of the statute contains not one word about the form such state statutes might take and, more important, the validity of the many possible permutations. While Congress obviously contemplated that some states might enact laws permitting interstate banking in the future, it nowhere stated or implied that such statutes would not be subject to scrutiny under the Commerce and Compact Clauses, or any other provisions of the Constitution.

b. Under this Court's Commerce Clause decisions, the proponents of discriminatory laws must show that Congress intended to authorize discrimination that would otherwise violate the Commerce Clause. It is not sufficient that Congress contemplated the enactment of state laws in the field, or even that Congress deferred to such laws because such deference does "not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress deferred." *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982) (emphasis in original). Rather, the statutory language must unmistakably show "congressional authorization of otherwise impermissible state interference with interstate commerce," thereby establishing that "Congress affirmatively contemplated otherwise invalid state legislation." *Wunnicke*, —— U.S. at ——, 104 S. Ct. at 2242 (1984).

There is no support for the Solicitor General's suggestion that "the decisions in which the Court has applied this doctrine have little bearing here." Board Opp. 7. Banking and related financial activities, while of substantial local concern, are not exempt from the traditional strictures of the Commerce Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). And the suggestion that this fundamental doctrine of Commerce Clause jurisprudence is limited to standard non-preemption clauses or controversies where analogous federal policy is relied upon (Board Opp. 8 n.14; CBT Opp. 21-23) has no support in the case law, as *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 427-31 (1946)—the principal case cited by respondents—makes clear. Indeed, the *Benjamin* Court found the requisite "unmistakable intent" in various substantive provisions of the McCarran-Ferguson Act, which authorizes taxation by states of insurance companies free from the constraints of the dormant Commerce Clause by the following *express* language: "The Congress hereby declares . . . that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U.S.C. § 1011. This and other unambiguous language (*see* App., *infra*, A4-A5), coupled with equally unambiguous legislative history, established that Congress, acting with "full knowledge" (328 U.S. at 430), had waived the protections of the Commerce Clause.

The explicit language employed by Congress in the statute reviewed in *Benjamin*, and this Court's reliance on that specificity, underscore the absence of any comparable language in the Douglas Amendment and the resulting constitutional infirmities of the statutes challenged here.

c. The language and history of the Douglas Amendment —which respondents concede was enacted in hasty fashion— contain no indication that Congress intended to tear down the traditional barriers to discriminatory state legislation and thereby empower groups of states to boycott sister states. There is no grant of authority to discriminate in a manner that would otherwise contravene the Commerce Clause. Therefore, it is wrong for respondents to argue (CBT Opp. 22, 27 n.66) that petitioners must cite "legis-

lative history indicating an intent to restrict the states' authority in this regard." The burden of persuasion cannot be shifted: it is *respondents' burden* to demonstrate by unmistakable evidence that discriminatory state legislation was so authorized. That is a burden they cannot sustain.

In view of these well-established principles, this is no occasion to "defer to the Board" on the issue of statutory construction raised in this case. Board Opp. 6. "A reviewing court 'must reject administrative constructions of a statute . . . that are inconsistent with the statutory mandate . . . .' " *Securities Industry Association* v. *Board of Governors*, —— U.S. ——, 52 U.S.L.W. 4943, 4945 (June 28, 1984). Moreover, the Board has expressed perplexity over the statutory issue (Pet. 7-8), and, in the court of appeals, declined to interpret the statute at all, reasoning that the "legal issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes remains for this Court to decide." App. Br. 19. It is manifestly inappropriate for the Solicitor General to recommend that this Court rely on the very "expertise" that the Board denies having exercised in this proceeding.

d. Certain respondents (but neither the Solicitor General nor the Board) also argue (CBT Opp. 10, 23-24) that "*Congress*—not the states—'balkanized' the nation for purposes of interstate banking," and that this purportedly justifies any discriminatory legislation which the states might enact. The federal statutory pattern offers not the slightest support for unbridled discriminatory state legislation. Under the federal banking statutes, Congress has permitted individual states to exercise sovereign authority over internal banking affairs. All states are treated in an identical fashion. Congress has never given preferred status to some states, while relegating other states to the status of boycott targets. Federal policy is one of "competitive equality." *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

Moreover even if state law paralleled federal law in this area, respondents' argument would be unavailing.

"The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." *Wunnicke,* —— U.S. at ——, 104 S. Ct. at 2243.

e. Respondents' assertion (CBT Opp. 10) that Congress authorized regionally discriminatory state laws "28 years ago when it enacted the Douglas Amendment" ignores the current legislative realities described in the Solicitor General's brief. Board Opp. 13. In this connection, we draw the Court's attention to the September 14, 1984 letter of Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, to Congressman Thomas P. O'Neill, Jr., in which he emphasizes that regionally discriminatory banking legislation has serious Constitutional and economic implications, and could "significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent states from aligning themselves into rival economic coalitions." App., *infra,* A3.

In view of these substantial unresolved questions of policy, it would be a gross disservice to Congress simply to impute to it an unexpressed intention to permit regionally discriminatory statutes based on the general language of the Douglas Amendment.

f. Respondents mistakenly argue (CBT Opp. 15-19) that the Connecticut and Massachusetts Acts are similar to interstate banking statutes enacted by certain other states which utilize geographically neutral criteria to regulate the expansion of out-of-state bank holding companies. They speculate that if the Conecticut and Massachusetts Acts are unconstitutional these other statutes may also be called into question. While these other statutes are not at issue here, the Board nonetheless answered respondents' contention: such statutes impose "substantially less of a burden on commerce in the furtherance of legitimate state objectives . . . ." Pet. App. A71. In contrast to the state statutes at issue in this case, the other states' laws do not rest on naked regional parochialism, do not have the purpose and effect of imposing a concerted multi-

state boycott against disfavored sister states, and are not a source of friction in the federal system.

For similar reasons, there is no merit to respondents' assertion that *Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975), lends support to the decision below. The state statute at issue in that case was not part of a multi-state exclusionary arrangement, and was not intended to secure a competitive advantage for certain states at the expense of sister states. Accordingly, the Board correctly held that the *Iowa Independent Bankers* decision—which involved neither a Commerce Clause nor Compact Clause challenge—is irrelevant to the issues in the present litigation. Pet. App. A67-A69.

2. The Reciprocal, Regionally Discriminatory State Statutes At Issue Infringe The Compact Clause

The harmful impact of these discriminatory state laws is compounded radically by the fact that they are constituents of a multi-state boycott. As all parties agree, these regionally restrictive, reciprocal laws are rapidly spreading across the United States. The State of New York has pointed out in its brief *amicus curiae* in this Court that such attempts to boycott the interstate commerce emanating from disfavored states are a potent source of friction in the federal system. Such discriminatory compacts strengthen commerce within preferred geographical regions at the expense of commerce in excluded states with the inevitable threat of economic retaliation. *Compare* Connecticut Opp. at 17 (the compacting states "are justified in excluding New York" in order to pursue local economic advantages) *with* New York *amicus* brief at 2 ("[t]hese statutes are manifestly harmful to the interests of the State of New York"). This is exactly what the Compact Clause is designed to avert.

a. Respondents' confusion about the governing Constitutional standard requires a brief summary of the pertinent provisions. Agreements among states which invade the rights of their sister states are subject to flat prohibition

under the Treaty, Alliance or Confederation Clause of the Constitution. *Holmes* v. *Jennison,* 39 U.S. (14 Pet.) 540, 570 (1840); *Ford* v. *Surget,* 97 U.S. 594, 603 (1878); *United States Steel* v. *Multistate Tax Commission,* 434 U.S. 452, 460, 467 n.18 (1978). Agreements of lesser concern to sister states, but which will affect their sovereign interests, are subject to prior Congressional approval under the Compact Clause to preserve the harmony of the federal union. 434 U.S. at 467 n.18. Only those agreements which, unlike the New England Compact, have no potential to derange relations among the states may evade Congressional supervision. Such agreements may "neither project a new presence onto the federal system nor alter any state's basic sphere of authority." *Id.* at 469 n.21.

Respondents' insistence that in order for a compact to require Congressional approval it must encroach directly on federal supremacy (CBT Opp. 25 n.64) would render the Compact Clause a superfluous restatement of the Supremacy Clause. Rather, multi-state compacts require prior approval if they have the "potential" to undermine the welfare of the federal union (*Multistate Tax Commission,* 434 U.S. at 471-72), *or* threaten "the derangement of [a state's] federal relations with the other states of the Union." *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657, 726 (1838). *See also Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 494 (1855) (the Compact Clause "is obviously intended to guard the rights and interests of other States, and to prevent any compact or agreement between any two states, which might affect injuriously the interest of the others"). No congressional renunciation of this federal interest in a harmonious union of the states can be read into the Douglas Amendment.

The multi-state compact at issue in this case clearly expands the political stature of the compacting states by increasing their economic leverage at the direct expense of boycotted states, and thus falls within the category of compacts that require Congressional review and approval. Such a compact erodes the foundations of a harmonious union by sowing discord among the states in contravention of fundamental federal interests and may, as the Chairman of the House Judiciary Committee has noted,

provoke reprisals and "retaliation by States in excluded regions of the country." App., *infra*, A3. *See also Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911) ("the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized").

b. To allow such a combination to be undertaken by the states without Congressional approval is to ignore the history of the Constitution itself. The Founding Fathers repeatedly warned of the dangers of "partial confederacies" or "combinations" among the states. *See* excerpts from Madison, *Debates in the Federal Convention of 1787*, reprinted in *Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 398, 69th Cong., 1st Sess. (1927), quoted at 10-11 of Chase Manhattan Bank's *amicus* brief. *Accord Federalist Paper* No. 7 at 62-63 (Rossiter ed. 1961). Because of this fear of "schemes for division" of the states "into two or more separate groups," the Founding Fathers strictly regulated "any agreement or compact with any other state." II G. Bancroft, *History of the Formation of the Constitution* 141 (1882). The Compact Clause was designed to protect the states against discord caused by self-aggrandizing combinations: "Each state was confined in its government strictly to its own duties within itself." *Id.*

These concerns of the Founding Fathers reinforce the dictates of common sense. States may not form regional combinations harmful to the welfare of sister states without the approval of the national legislature.

3. The Great Public Importance Of The Issues Raised By The Petition Underscores The Imperative Need For Immediate Review

a. The Solicitor General has agreed with petitioners that weighty public policy considerations militate in favor of immediate review in this case (Board Opp. 10-11): (1) the questions decided by the court of appeals are certain to spawn additional burdensome litigation across the country; (2) this case presents "issues concerning the basic relationship of the states to one another, of the sort this Court

frequently has addressed;" (3) if review is deferred, the structure of the entire banking industry will be fundamentally and perhaps irreversibly altered before Congress or this Court can review the situation; and (4) delay in securing review will lead banking institutions across the country to invest substantial resources in acquisitions that may later require divestiture. In view of these considerations, "an authoritative decision by the Court in advance of this widespread activity would be of substantial public benefit." *Id.* at 11.

b. The countervailing considerations cited by the Solicitor General do not justify a postponement of review. While Congress *might* someday enact legislation in this area that would resolve the issues, the Solicitor General is forced to concede that "congressional action is far from assured." Board Opp. 13. Indeed, in 1984, as in 1983, Congress has once again refused to authorize exclusionary banking confederations.

The absence (to date) of a conflict among the circuits is also not a reason for deferring review, since the decision below conflicts in principle with past decisions of this Court construing both the Commerce and Compact Clauses. Moreover, waiting for a conflict among the circuits will expose Congress, this Court, and the general public to serious hazards. The structure of the entire banking industry will be transformed through regionally discriminatory laws before either Congress or this Court can intercede. Congress and this Court will then be faced with a *fait accompli.* And if the Second Circuit's ruling ultimately proves to be erroneous, a painful choice would be thrust upon the Nation between widespread divestitures and allowing the economy to suffer the continuing effects of unconstitutional balkanization.

In these circumstances, review by this Court should not be postponed. Additional litigation in other circuits could not contribute to the elucidation of the issues, which already have been explored in comprehensive detail by the parties, the *amici,* and the tribunals below. They are well-focused questions amenable to ready resolution by this Court under familiar legal principles.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000

Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153

Counsel for Petitioner Citicorp

JOHN BOYER
GREGORY SCOTT MERTZ

CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005

Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO

MAYER, BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604

Counsel for Petitioners

APPENDICES

APPENDIX A

Letter from Peter W. Rodino, Jr., Chairman of the U.S. House of Representatives Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the U.S. House of Representatives (September 14, 1984)

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, D.C. 20515
Telephone 202-225-3951

September 14, 1984

Honorable Thomas P. O'Neill, Jr.
The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The "Financial Services Competitive Equity Act" (S. 2851), which was debated on the Senate floor during the past week, will reach the House shortly. On behalf of the Committee on the Judiciary, I am writing to you to request that this bill be referred to this Committee for consideration and possible action as a result of certain provisions which substantially affect matters coming within Rule X jurisdiction of the Committee.

In particular, Title X of S. 2851 contains language that would grant prior Congressional consent to certain groupings of States to enter into interstate compacts involving regional banking activities. It is important that this Committee—which has jurisdiction over interstate compacts generally—be permitted to review the language and intent of this provision because Title X on its face appears to be

a major departure from past practice in the manner in which Congress approves an interstate compact consistent with the Compact Clause of the Constitution. In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States seeking to join; and the second being those that do not interfere with the Federal regulation of matters of national concern. In contrast, Title X would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

In addition, Title X departs from past Congressional practice and procedure in that it would grant prior approval to such compacts rather than to require subsequent approval on a case-by-case basis. Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. Title X would, in essence, preauthorize compacts without advanced review of the content or standards contained in those agreements. While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences. The Judiciary Committee—the Committee of jurisdiction in this instance—has had no such opportunity to develop a record or engage in any deliberations on the potential Constitutional and economic implications of Title X.

By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks

within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country.

Title X also has important implications for the Federal antitrust laws, also a subject matter within the jurisdiction of the Judiciary Committee. The cornerstone of American antitrust law is the principle that unrestrained competition will yield the best allocation of our economic resources, thus benefitting the interest of consumers. Because such compacts as provided by Title X may work to restrict competition for deposits and loans, the price for that type of restriction might well be paid by consumers. The implications of this legislation for the national competition policy will therefore also need careful scrutiny by this Committee.

For the above reasons, I request that you refer S. 2851 to the Judiciary Committee for its review. Furthermore, it is requested that Members of this Committee be included in any conference on S. 2851.

With best wishes,

Sincerely,

/s/ Peter W. Rodino
Peter W. Rodino, Jr.
Chairman

PWR:jyl

APPENDIX B

Statutory Provisions

1. The McCarran-Ferguson Act, 15 U.S.C. §§ 1101-1105 (1946), provides in pertinent part:

> "[T]he Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."

2. The Douglas Amendment, 12 U.S.C. 1842(d), provides in pertinent part:

> "Notwithstanding any other provision of this section, no application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding com-

pany, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. . . ."

No. 84-363

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CLERK

IN THE

Supreme Court of the United States

October Term, 1984

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SUPPLEMENTAL BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

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767 Fifth Avenue
New York, New York 10153
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JOHN BOYER
GREGORY SCOTT MERTZ
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One Wall Street
New York, New York 10005
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

Supplemental Memorandum

Pursuant to Rule 22.6 of the Rules of this Court, petitioners wish to draw this Court's attention to significant new developments that have occurred since petitioners last filed papers with the Court. On November 20, 1984, notice appeared in the *Federal Register* that Sun Banks, Inc. and Trust Company of Georgia have filed an application seeking the approval of the Board of Governors of the Federal Reserve System ("Board") to merge pursuant to the regionally restrictive banking legislation enacted in Georgia and Florida. *See* 49 Fed. Reg. 45808 (1984). This transaction is but the first of what will likely be numerous transactions proposed pursuant to the discriminatory compact that has been formed in the Southeast. As reported in the New York Times article entitled "Atlanta Awaits Bank Mergers," dated August 30, 1984, at Dl, banking institutions in the Southeast are "scrambling to find merger partners" under the discriminatory legislation in effect in that area. This compact, which is similar to the New England Compact currently before this Court, demonstrates that restrictive interstate banking regions are forming across the country.

Petitioners also wish to advise the Court that on November 19, 1984, the Board approved another transaction based on the regionally discriminatory laws of Rhode Island and Connecticut—the acquisition by Hartford National Corporation of Rhode Island National Bank. The Board's November 19, 1984 order, together with its orders approving the three acquisitions that are the subject of Citicorp's petition for certiorari in *Citicorp* v. *Board of Governors* (No. 84-754), bring to seven the number of

approved transactions based on the regionally restrictive banking compact in New England.

This flurry of acquisitions pursuant to legislation of dubious constitutional validity highlights the need for review by this Court at this time. If review is delayed, the state-created balkanization of the banking industry will become a *fait accompli* before either this Court or Congress has had an opportunity to intercede.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

JOHN BOYER
GREGORY SCOTT MERTZ
CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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No. 84-363

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,
v.
THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,
and
BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN CORPORATION
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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No. 84-363

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

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Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION

INTEREST OF AMICUS CURIAE

The Chase Manhattan Corporation is a bank holding company with its principal place of business in New York. Operating through The Chase Manhattan Bank, N.A., and other subsidiaries, it provides financial services to individuals, corporations and governmental entities

throughout the United States and in more than 100 other countries.

Chase Manhattan's non-bank financial services subsidiaries are present and maintain offices in nearly twenty states, including Massachusetts and Connecticut.[1] These non-bank subsidiaries offer some services that compete directly with those of intervenor-respondents and other financial institutions based in New England. Nevertheless, the regional banking compact upheld by the court below bars Chase Manhattan and its subsidiaries from competing on an equal footing simply because Chase Manhattan is headquartered outside New England.[2]

Given the importance of the questions presented and the dangers inherent in the Balkanization of the nation's banking system, Chase Manhattan submits this brief in support of petitioners. All parties have consented to the filing of this brief *amicus curiae*, and the written consents have been filed with the Clerk of the Court.

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[1] Chase Commercial Corporation, which provides asset-based lending and equipment lease financing, has offices in Boston and Canton, Massachusetts. Chase Home Mortgage Corporation engages in mortgage banking at offices in Boston and Waltham, Massachusetts. Chase National Corporate Services, Inc. has regional marketing offices in Stamford, Connecticut, and Boston, Massachusetts, that promote Chase's commercial lending and other services. Chase Manhattan Financial Services, Inc. provides consumer and small business financial services and trust representative services at an office in Greenwich, Connecticut.

[2] Sponsors of the Compact have made no secret of its principal target: the major New York money center banks, including Chase Manhattan. The Massachusetts act's sponsor, Senator John Brennan, has stated that the act is to prevent entry of "big money center banks." N.Y. Times, April 3, 1983 (*see* Pet. App. A189). *See also* Conn. Senate Debate (May 18, 1983) (statement of Senator Sullivan) (Pet. App. A159); *Panelists Predict Bigger Regions Following Regional Banking Compacts*, 42 Washington Financial Rep. (BNA) 1081 (June 25, 1984) ("money-center banks in New York, California, and Illinois" are excluded from regional compacts).

SUMMARY OF ARGUMENT

The New England Compact is an unprecedented and avowedly protectionist scheme intended to secure benefits for certain interests in one section of the country at the expense of residents of other states. The inevitable effect of this concerted boycott is to invite reprisal and nurture a sectionalism so dangerous that the Framers of the Constitution established constitutional protections to guard against it.

No federal statute authorizes this affront to fundamental constitutional principles. The Douglas Amendment to the Bank Holding Company Act of 1956, on which the court below and the Federal Reserve Board relied, stops far short of authorizing the New England Compact, even by implication. The Douglas Amendment permits the states to lift the general federal prohibition on the acquisition of a bank by a bank holding company in another state. But the Amendment neither states nor suggests that Congress intended to free the states from all constitutional constraints on the manner in which they exercise that authority.

At least in the absence of clear congressional authorization, the New England Compact cannot pass muster under the Commerce or Compact Clauses of the Constitution. The Massachusetts and Connecticut statutes discriminate against out-of-state bank holding companies solely by reference to their state of origin. They are, therefore, *per se* unlawful under the Commerce Clause. They also violate the Compact Clause because they constitute a compact to which Congress has concededly not consented. Unlike compacts that have been held not to require congressional consent, the New England Compact has a substantial impact on the nation's federal structure. First, in an area of pervasive federal regulation, the Compact enables its members to accomplish a result through concerted action that no one of them could have achieved on its own. Second, the Compact redounds to

the benefit of a particular group of states and to the harm of others. As a result, the absence of congressional consent is fatal to the Massachusetts and Connecticut acts before the Court.

ARGUMENT

The New England Compact at issue in this case is without precedent in our constitutional history.[3] To be sure, this Court has had experience enough with protectionist schemes intended, as this one plainly is, to secure a benefit for certain local interests at the expense of outsiders. But the problem presented here is twice compounded. First, the Massachusetts and Connecticut acts at issue in this case distinguish among the residents of other states *explicitly on the basis of their state of origin.* Connecticut, for example, opens its door to residents of Massachusetts, Maine, New Hampshire, Vermont and Rhode Island, but it excludes the residents of New York, New Jersey, Pennsylvania and the rest. It is hard to imagine a more direct repudiation of the principle that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[4] Second, Massachusetts and Connecticut have *acted in concert*, exacerbating the effects of their discriminatory arrangement and creating even greater opportunity for disharmony among the states, sectional rivalry, and reprisal.

From their experience under the Articles of Confederation, the Framers of the Constitution were all too familiar with the dangers of interstate rivalry and sectional-

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[3] As *amicus* noted in its brief in support of the petition for writ of certiorari, numerous other states have established or considered establishment of exclusionary regional banking blocs based on the New England model. Thus, while the New England Compact is the first step down this road, there is no doubt that it will be followed by many others if the decision of the court below is sustained by this Court.

[4] *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

ism.[5] In his Farewell Address, President Washington warned against the temptation to subdivide the nation into regions defined by reference to some perceived common core of mutual interest:

> ". . . it is of infinite moment that you should properly estimate the immense value of your national union . . . indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest . . . ."
>
> * * *
>
> "In contemplating the causes which may disturb our union, it occurs, as a matter of serious concern, that any ground should have been furnished for characterizing parties by geographical discriminations—Northern and Southern, Atlantic and Western—whence designing men may endeavor to excite a belief that there is a real difference of local interests and views." [6]

Numerous clauses of the Constitution give evidence of the Framers' determination to promote harmonious relations among the states and achieve the economic benefits

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[5] *See e.g.*, Hamilton's vivid warning against the evil of alliances or confederacies of states arrayed against each other, in *The Federalist Papers*, No. 7 at 62-63 (Rossiter ed. 1961).

[6] Washington, Farewell Address, Sept. 19, 1796, *quoted in The World's Great Speeches* 250-51 (3d ed. 1973). *See also* G. Wills, *Cincinnatus—George Washington and the Enlightenment* 89 (1984):

> "Even in 1792, when Washington had Madison draft (from dictated notes) the earliest form of the Farewell Address, he warned against sectionalism and division. This was the great danger to the vision Washington had for his country. . . . At the end of the war he wrote: 'I think the blood and treasure which has been spent in it has been lavished to little purpose, unless we can be better Cemented [a favorite term] . . . When the band of Union gets once broken, everything ruinous to our future prospects is to be apprehended.' "

(square brackets in original) (citation omitted).

of a national common market, free of internal trade barriers. Two of these clauses are pertinent here: the Compact Clause [7] and the Commerce Clause.[8]

In a boundary dispute case decided more than 100 years ago, this Court described the purpose of the Compact Clause:

> "This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others. And the right and the duty to protect these interests is vested in the general government." [9]

Similar concerns about evenhandedness and non-discrimination undergird much of the analysis under the Commerce Clause. Indeed, the Commerce Clause was adopted in large measure to deprive the states of the power "to harass each other with rival and spiteful measures dictated by mistaken views of interest." [10] The New

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[7] Art. I, § 10, cl. 3 provides, "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

[8] Art. I, § 8 grants to Congress the power to "regulate Commerce . . . among the several States . . . ."

[9] *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855).

[10] Letter from James Madison to George Washington, April 16, 1787, *quoted in* 1 Beveridge, *The Life of John Marshall* 312 (1916). The Commerce Clause presents one of the greater ironies of this case. In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), a seminal Commerce Clause decision, the Court broke up New York's stranglehold on shipping by steamship in the Hudson Valley and Long Island Sound, which operated to the detriment of citizens of many other states. After the decision, there was literal rejoicing up and down the East Coast, not least in New England. Yet far from hurting New York, the emergence of free trade in interstate shipping "was the most potent factor in the building up of New York as a commercial center." Warren, *The Supreme Court in United States History* 76 (1922). Now, with a misguided, jealous and discriminatory view of their self-interest, the states that were the primary beneficiaries of this Court's decision in *Gibbons* have enacted leg-

England Compact strikes at the heart of these long-established principles.

I. NO FEDERAL STATUTE AUTHORIZES THIS UNPRECEDENTED AFFRONT TO FUNDAMENTAL CONSTITUTIONAL PRINCIPLES.

Since it is essentially conceded that the Compact cannot withstand constitutional scrutiny under either the Commerce or Compact Clauses in the absence of congressional authorization,[11] the central question now before this Court is one of statutory interpretation. The court below and the Federal Reserve upheld the New England Compact because they found that Congress had impliedly authorized it in the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842 (d). Given the primary importance of the statutory question, *amicus* will consider first whether the Douglas Amendment does, in fact, authorize this avowedly discriminatory interstate arrangement,[12] and then turn to the analysis under the Commerce and Compact Clauses.

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islation boycotting the rest of the country—with special emphasis on New York. *Gibbons* teaches that Balkanization of trade is constitutionally unacceptable. Our history teaches that the path to a sound economy lies in trade free of such discrimination.

[11] *See* Brief for the Federal Respondent in Opposition at 5 ("In the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause"). The Federal Reserve Board noted that "[a]bsent congressional authorization of [the Connecticut statute] in the Douglas Amendment, it appears that [the statute] would be inconsistent with the standards for state action under the Commerce Clause . . . ." (Pet. App. A55). Similarly, the Board rejected the Compact Clause attack, despite its recognition that the Massachusetts and Connecticut Acts constitute a "compact," (Pet. App. A51-52), on the theory that the Douglas Amendment so completely renounces federal interest in the terms and conditions under which interstate bank consolidations can take place as to obviate any need for congressional consent. (Pet. App. A52).

[12] Whether Congress even has the *authority* to permit an arrangement of this kind is a question of first impression that this

Considering the admittedly protectionist purpose and effect of the New England Compact and the total absence of any constitutional precedent for such a scheme, one would suppose that the statute relied on by the Board and court below must speak with remarkable clarity on this point. In fact, the Douglas Amendment stops far short of authorizing the New England Compact, even by implication.

1. This Court has repeatedly held that congressional authorization can save a statute otherwise invalid under the Commerce Clause only where congressional intent is "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237 (1984). That requirement serves a dual purpose. First, it eliminates doubt about what Congress really intended. As the Court has explained:

> "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, . . . we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'"

Court need not reach, given the abundant evidence that Congress has not authorized anything like the New England Compact. The question of congressional power is not, in any event, without difficulty. *See* Comment, *Regional Banking Statutes and the Equal Protection Clause*, 84 Colum. L. Rev. 2025 (1984) (reasoning that discriminatory regional banking statutes violate the Equal Protection Clause and that Congress has no power to authorize them). It could also be argued that the New England Compact is a "Treaty, Alliance or Confederation" within the meaning of Art. I, § 10, cl. 1, because it encroaches upon the power of sister states. *See Ford* v. *Surget*, 97 U.S. 594, 603 (1878); *Williams* v. *Bruffy*, 96 U.S. 176, 183 (1877); *cf. United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 466-67 n.18 (1978) (quoting *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833)). Unlike a "compact," to which Congress can consent under art. I, § 10, cl. 3, a "Treaty, Alliance or Confederation" is unconstitutional with or without congressional authorization.

New England Power Co. v. *New Hampshire*, 455 U.S. 331, 343 (1982). Second, the clear-statement requirement assures that all potentially affected interests have fair notice and an opportunity to participate in the resolution of the issue through the political process. As this Court stated last Term,

> "[W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."

South-Central Timber Development, Inc. v. *Wunnicke*, 104 S. Ct. at 2243.

Both of these concerns are implicated here. There is substantial reason to doubt that Congress had anything at all "in mind" on the subject of exclusionary regional compacts, since nothing like the New England Compact was even remotely in contemplation when Congress enacted the Douglas Amendment. By the same token, it is hard to see how Congress could have reached a "collective decision" to allow a group of states to establish a concerted boycott directed at other states when no one had the slightest reason to suppose that such a proposal was even on the table.[13]

2. The Douglas Amendment does not even purport to confer plenary regulatory authority on the states.[14]

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[13] The Federal Reserve Board was more candid than the court below about the difficulty of finding unmistakable evidence that the Douglas Amendment was intended to authorize the New England Compact. It noted that the Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court." (Pet. App. A65).

[14] This Court has previously contrasted the Douglas Amendment with section 7 of the Bank Holding Company Act, a provision not at issue here, in these terms:

Rather, it constitutes a limitation on the power of the Federal Reserve Board to approve acquisitions under the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* The Amendment prohibits the Board from approving an application under which a bank holding company or any of its subsidiaries would acquire a bank located in another state unless the acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d)(1).[15]

"In contrast to § 3(d) [the Douglas Amendment], § 7 of the Act *does* reserve to the States a general power to enact regulations applicable to bank holding companies."

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27, 48 (1980) (emphasis added). Congress is fully capable of conferring plenary regulatory authority on the states when it wants to, as the McCarran-Ferguson Act illustrates:

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose *any* barrier to the regulation or taxation of such business by the several States."

15 U.S.C. § 1011 (emphasis added).

[15] The full text of the Amendment is as follows:

"Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 U.S.C. § 1823(f)]) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, *unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely*

As this Court has previously explained,

> "it is doubtful that [the Douglas Amendment] authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis in original).

By its own terms the Douglas Amendment refutes the contention that Congress has unmistakably authorized the New England Compact. The Amendment says nothing whatsoever about regional banking or the power of a single state, let alone a group of states acting in concert, to discriminate among out-of-state bank holding companies solely on the basis of their state of origin. As respondents would have it, when Congress granted the states authority to make exceptions to the general federal prohibition on interstate acquisitions, it *must* have intended to remove (to whatever extent it had power to do so) all constitutional constraints on the manner in which a state might exercise that authority. On their reading of the Amendment, the grant of authority to make an exception necessarily carries with it the authority to draw any line whatsoever, no matter how arbitrary or blatantly discriminatory, no matter that it flouts well established and otherwise applicable con-

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by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest." (Emphasis added.)

stitutional principles bearing on interstate relations and the proper functioning of the federal system. In fact, that "reading" of the Amendment makes no sense as a matter of logic or common sense, and it finds not one iota of support in the language of the Amendment.[16]

3. Contrary to the conclusion of the court below (Pet. App. A29), the Federal Reserve Board's interpretation of the Douglas Amendment is entitled to no special deference. First, the Board conceded that it had no expertise regarding the constitutional issues raised by this case. (Pet. App. A41). Second, the Board was equivocal at best in its findings on the language and legislative history of the Douglas Amendment.[17] Third, the Board did not even purport to exercise its presumed administrative expertise in construing the Douglas Amendment. On the contrary, it specifically declined to comment on the "desirability, as a matter of national policy, of the regional arrangements" supposedly authorized by the Douglas Amendment, and it stated that "the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action." (Pet. App. A47-48). Finally, the Board's own chairman has called into question the validity of the Board's conclusion, stating that the Board perceives "seri-

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[16] The Federal Reserve conceded that the Amendment "does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states." (Pet. App. A65) (emphasis in original). Moreover, the fragmentary legislative history of the Douglas Amendment provides no reason to believe that Congress intended to confer on the states a broad immunity from the constitutional principles that ordinarily limit the exercise of state power. As the Board noted, the Amendment was "proposed during the debate on the Senate floor and there is no committee or other significant legislative history to clarify its meaning." (Pet. App. A66).

[17] *See* notes 13, 16 *supra*.

ous questions both about the constitutionality of such arrangements [regional banking compacts] and their implications for public policy." (Pet. App. A199). Under these circumstances, this Court owes no deference to the Board in construing the Douglas Amendment.

4. Proponents of the New England Compact and similar multistate banking schemes have made vigorous (but so far unsuccessful) attempts to obtain express congressional approval,[18] effectively acknowledging that the Douglas Amendment does not provide the necessary authorization. Their efforts in the last session of Congress came to naught when Representative Fernand J. St Germain, Chairman of the House Banking Committee, declared that regional banking compacts "raise significant constitutional questions" and served notice that his Committee would not take up the issue in the closing hours of the session.[19] House Judiciary Committee Chairman Rodino noted that his Committee would have to hold hearings on any legislation to authorize regional banking compacts, and he explained that

> "[i]t is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause . . . ." [20]

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[18] *See, e.g.*, H.R. 2431, 98th Cong., 1st Sess. (1983) (introduced by Rep. Frank); S. 1002, 98th Cong., 1st Sess. (1983) (introduced by Sen. Tsongas). A provision authorizing regional banking was included in an omnibus banking bill, the Financial Services Competitive Equity Act, S. 2851, 98th Cong., 2d Sess. (1984), that passed the Senate on September 13, 1984, but the bill died at the end of that session of Congress for want of action by the House.

[19] 130 Cong. Rec. H10005 (daily ed., Sept. 24, 1984).

[20] Letter from Peter W. Rodino, Chairman, House Comm. on the Judiciary, to House Speaker Thomas P. O'Neill, Jr., Sept. 14, 1984, reproduced in the Appendix to the Brief Amicus Curiae of The Chase Manhattan Corporation in Support of the Petition for Writ of Certiorari.

Chairman Rodino also pointed out that Congress disfavors the pre-authorization of compacts and would not grant blanket approval in advance without the most careful deliberation:

> "Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences."[21]

Again in this session of Congress proponents of regional banking compacts have introduced legislation to authorize these unprecedented arrangements.[22]

5. The New England Compact has spawned a host of rival banking coalitions that threaten to remake the structure of the nation's banking industry. The public policy questions raised by this momentous development, which are undeniably of national proportions, could hardly have been anticipated by Congress 30 years ago when it passed the Douglas Amendment. Now, with compact proponents seeking express congressional authorization, Congress can face these questions squarely and make a collective decision, with all affected interests represented, as to whether this new development serves or disserves the interests of the nation as a whole. No attempt, however ingenious, to pour unintended meaning into the Douglas Amendment can change the fact that Congress has not yet made any such decision.

II. THE MASSACHUSETTS AND CONNECTICUT ACTS VIOLATE THE COMMERCE CLAUSE.

Stripped of their non-existent statutory authorization, the Massachusetts and Connecticut Acts must be con-

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[21] *Id.*

[22] *See* H.R. 15, 99th Cong., 1st Sess. (1985) (introduced by Rep. Wylie); H.R. 52, 99th Cong., 1st Sess. (1985) (introduced by Rep. Barnard).

demned under long-established principles of Commerce Clause adjudication.

1. The Massachusetts and Connecticut Acts discriminate against out-of-state bank holding companies solely by reference to their state of origin. These Acts are paradigms of the overtly protectionist legislation repeatedly struck down by this court as *per se* violations of the Commerce Clause.[23]

2. Even assuming *arguendo* that the Massachusetts and Connecticut statutes were enacted to promote some colorably legitimate state purpose—and the record below makes clear that they were not—the statutes would nevertheless violate the Commerce Clause. This Court has held that state statutes affecting interstate commerce will be upheld "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." [24] The statutes at issue here make a mockery of "evenhanded" regulation—they explicitly distinguish between interstate and intrastate transactions and compound the problem by distinguishing among nonresidents on the basis of their state of origin. Moreover, the effects on interstate commerce can hardly be described as "incidental." The very purpose of the statutes is to address the competitive balance between financial institutions inside and outside the protected region, and the means chosen is a prohibition on a broad class of interstate transactions.

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[23] *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

[24] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

This Court has identified an economic [25] and a political [26] element underlying the Commerce Clause. The Massachusetts and Connecticut statutes offend both. Economically, they create a new regional banking market from which out-of-region banks are excluded. Politically, they impose the burdens of the legislation squarely on persons excluded from the Compact states' political processes.

3. The Court below stated that the Massachusetts and Connecticut acts at issue here "would appear to promote interstate commerce rather than restrict it" because "[w]ithout these statutes no out-of-state bank holding companies could acquire Massachusetts or Connecticut banks." (Pet. App. A29). That reasoning cannot save these statutes from condemnation under the Commerce Clause.

In the first place, the validity of a state statute whose very purpose is to "suppress or mitigate the consequences of competition between the states" [27] cannot be deter-

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[25] *See H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-38 (1949):

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has its corollary that the states are not separable economic units. As the Court said in [*Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 527 (1935)], 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'"

[26] Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subject to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Dep't* v. *Barnwell Bros*, 303 U.S. 177, 185 n.2 (1938). *See also Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-68 n.2 (1945).

[27] *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

mined by reference to nice calculations of the number of interstate transactions likely to occur with and without the challenged statute. The Massachusetts and Connecticut acts are offensive to the most basic principles underlying the Commerce Clause: they discriminate against interstate commerce generally, and in particular against the residents of certain disfavored states. As this Court has recognized in describing the purpose of the Commerce Clause,

> "The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to *discriminate as between neighboring states* in admitting articles produced therein." [28]

In *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), this Court pointed out that

> "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently."

437 U.S. at 626 (emphasis added). Here, Massachusetts and Connecticut have not even purported to explain what it is about bank holding companies from New York or Missouri or Idaho—apart from their origin—that makes them undeserving of the same benefits they freely accord to bank holding companies from other New England states.[29]

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[28] *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939) (emphasis added).

[29] In *Great Atlantic & Pacific Tea Company* v. *Cottrell*, 424 U.S. 366 (1976), the Court rejected the contention that a restriction on interstate commerce was valid because it would have the net effect of increasing the amount of such commerce. At issue was a Mississippi regulation excluding Louisiana milk because Louisiana was

In any event, there is considerable room for doubt about what would happen "[w]ithout these statutes." (Pet. App. A29). The court below jumped quickly and uncritically to the conclusion that there would be more interstate acquisitions *with* the Massachusetts and Connecticut statutes than *without* them. But that conclusion rests on a decidedly uncertain factual premise—namely, that Massachusetts and Connecticut would allow no interstate acquisitions at all if forbidden to impose blatantly discriminatory conditions on such acquisitions. In fact, one might as plausibly assume that Massachusetts and Connecticut, along with many other states now considering legislation in this area, would authorize interstate acquisitions on some nondiscriminatory basis. Given the absence of any evidence in the record one way or another on this point, the court below had no basis for its conclusion that the challenged statutes "would appear to promote interstate commerce rather than restrict it."

III. THE MASSACHUSETTS AND CONNECTICUT ACTS VIOLATE THE COMPACT CLAUSE.

Application of the Compact Clause depends upon a finding that (1) two or more states have entered into a com-

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not prepared to accept Mississippi milk on a reciprocal basis. Referring to the broad purposes of the Commerce Clause, the Court rejected Mississippi's contention that its mandatory (though nondiscriminatory) reciprocity requirement would actually facilitate the free flow of commerce by helping Mississippi producers gain access to the Louisiana market. 424 U.S. at 378-81. The Court noted that Mississippi's approach "would plainly 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause,'" 424 U.S. at 380 (quoting *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951)), and it added that "[n]o 'parochial legislative polic[y],' . . . could be more precisely calculated to open 'the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation,'" 424 U.S. at 380 (quoting *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 538 (1949), and *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935)).

pact; (2) the compact is of a type that requires congressional consent; and (3) Congress has not consented.[30]

The first and third factors present no difficulty in this case. A compact need not be explicit or in writing,[31] and compacts frequently are expressed in reciprocal legislation.[32] Given the legislative history of the New England compact, which shows an unmistakable intention on the part of Massachusetts and Connecticut to act in concert, the court below and the Board had no difficulty concluding that their reciprocal statutes constitute an interstate compact. (Pet. App. A32, A51-A52).

Nor can there be any doubt concerning the absence of congressional "consent" to the compact at bar.[33] Whatever the Douglas Amendment means, it surely does not constitute consent within the meaning of the Compact Clause. It makes no reference to multistate action of any kind, and the debate surrounding its enactment contains no scrap of evidence to suggest that Congress intended by its passage to pre-authorize a breed of compact that no one had yet thought to propose.

The issue before this Court, therefore, is whether the New England Compact is the type of "Agreement or Compact" that is necessarily invalid (whatever its other infirmities) in the absence of congressional consent. This Court has noted that the Compact Clause requires congressional consent for agreements between states that tend "to increase the political power in the States, which

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[30] *Cuyler* v. *Adams*, 449 U.S. 433, 439-40 (1981).

[31] *Virginia* v. *Tennessee*, 148 U.S. 503, 517-18 (1893).

[32] *See United States Steel Corporation* v. *Multistate Tax Commission*, 434 U.S. 452, 469-70 (1978).

[33] The Board noted that "in form" the New England Compact was a "compact or agreement that has never been approved or authorized by Congress." It then proceeded to argue that no consent was necessary. (Pet. App. A52).

may encroach upon or interfere with the just supremacy of the United States." [34] "The relevant inquiry," the Court has explained, "must be one of impact on our federal structure." [35]

The court below offered neither reason nor citation in support of its one-sentence conclusion that the New England banking compact would not "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." (Pet. App. A32). In fact, the Compact will have precisely that effect in at least two distinct ways. First, it intrudes upon the pervasive federal regulation of interstate banking. Second, it aggrandizes the power of Compact states to the detriment of their sister states.

A. Interference With Federal Regulatory Authority.

The Federal Reserve Board and the court below maintained that the New England Compact could not encroach upon federal regulatory authority in the area of interstate banking because Congress renounced that authority in the Douglas Amendment. (Pet. App. A29, A52). That position rests on a fundamental misapprehension of the language, history and purpose of the Douglas Amendment and ignores the federal government's pervasive regulation of interstate banking.[36]

1. As this very litigation illustrates, the Bank Holding Company Act permits a bank holding company to acquire a bank in another state only with the approval of a federal agency: the Federal Reserve Board. The Board tests such acquisitions under federal standards.[37]

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[34] *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).

[35] *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 471.

[36] *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

[37] *See* 12 U.S.C. §§ 1842(a) and (d). The Board's criteria for approving such acquisitions indicate the pervasive nature of the

Out of deference to state concerns, the Douglas Amendment provides that an acquisition is *not* permitted unless, among other conditions, it is specifically authorized by the law of the state in which the acquired bank is located. That hardly suggests federal indifference to the conditions under which such acquisitions *do* take place.

2. In setting federal policy in this area, Congress has declined to give express approval to regional banking. Yet Connecticut and Massachusetts now seek to accomplish what Congress has declined to do. Through their joint action these states would bring about a result that neither could have achieved on its own. The success of the action taken depends upon the cooperation and reciprocal action of a neighboring state.

Thus, the agreement at issue in this case is critically different from the one before the Court in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978), where the Court held that the Multistate Tax Compact was valid without congressional consent. There, the Court rejected four separate contentions that the Compact aggrandized state power, noting that the member states could have exercised essentially the same power on their own authority. 434 U.S. at 473-76.[38] By contrast, the Massachusetts and Connecticut Acts do not merely establish parallel rules to govern the relationship of those states with the country as a whole. The Acts treat *participating* states differently from the rest of the country. This differential, brought about by agreement and not

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federal government's interest and regulatory control. The Board must assess potential anticompetitive effects of acquisitions, and it may approve an anticompetitive acquisition only if in the "public interest." 12 U.S.C. § 1842(c). The Board must further evaluate the involved banks' financial and managerial resources and the needs of the relevant communities. *Id.*

[38] The Multistate Tax Compact is distinguishable in a second major respect, noted at pages 23-24 *infra*.

simply by parallel action, is the very reason-for-being of the arrangement.

3. It is surely no answer to say, as did the court below, that Congress can adequately protect its interests by subsequently enacting legislation to restore the status quo. (Pet. App. A32). That reasoning stands the Compact Clause on its head. The plain intention of the Framers was to put the burden of obtaining congressional approval on the states that seek to establish a compact, not to make the opponents of a compact—including Congress itself—initiate action to disapprove it.[39]

B. Aggrandizement of State Power at the Expense of Other States.

The New England Compact encroaches on the supremacy of the United States in a second sense: It seeks to aggrandize the power of Compact states at the expense of their sister states.

1. It is in large part because compacts "may affect the interest of States other than those parties to the agreement . . . [that] Congress must exercise national supervision through its power to grant or withhold consent . . . ." [40] The Compact Clause serves to protect "the rights and interests of other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others." [41] It is designed to "guard against the derangement of [a

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[39] "The real test of the need for Congressional consent in the present day is the degree to which an interstate agreement *may* conflict with federal law or federal interests. If it runs any danger of conflict with federal law . . . the need for Congressional consent is clearly indicated."
F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1961) (emphasis supplied).

[40] Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1926).

[41] *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855).

state's] federal relations with the other States of the Union, *and* the federal government." [42]

2. As the Federal Reserve Board itself acknowledged, "[w]hile there are judicial decisions upholding interstate agreements, *these agreements have not had the objective of discrimination* but rather that of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements." (Pet. App. A50 n.5) (emphasis added).

3. In *United States Steel Corp.* v. *Multistate Tax Commission*, this Court implicitly recognized that a compact enlarging the power of some states at the expense of others can adversely affect the federal structure and trigger the requirement of congressional consent. Those who challenged the Compact alleged that it would impair the sovereign rights of non-member states. 434 U.S. at 477. The Court did not dismiss the contention as irrelevant to Compact Clause analysis, but rejected it on the basis of a finding that the Compact did not, in fact, "redound to the benefit of any particular group of States or to the harm of others." *Id.*[43]

The Multistate Tax Compact was open on a nondiscriminatory basis to any state that wished to join. By contrast, the regional banking compact at issue in this

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[42] *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (emphasis supplied). *See also United States* v. *Tobin*, 195 F. Supp. 588, 606 (D.D.C. 1961) (under the Compact Clause "Congress has a two-fold duty: . . . to prevent undue injury to the interests of non-compacting states" and to protect the interests of the federal government) (citations omitted).

[43] Moreover, in support of the proposition that "not all agreements between States are subject to the strictures of the Compact Clause," 434 U.S. at 469, the Court quoted approvingly from *New York* v. *O'Neill*, 359 U.S. 1 (1959), which upheld a uniform law designed to achieve interstate cooperation on the attendance of out-of-state witnesses at criminal proceedings. In *O'Neill*, the Court noted that the legislation, "[f]ar from being divisive, . . . is a catalyst of cohesion," and, therefore, falls "within the unrestricted area of action left to the States by the Constitution." 359 U.S. at 6.

case is open only to a select group of states that have discerned some benefit in banding together to the exclusion of their sister states. The New England Compact not only has the effect of injuring interests in other states; it is *intended* to "redound to the benefit of [a] particular group of States [and] to the harm of others."

Thus, the absence of congressional authorization is fatal to the New England Compact under the Compact Clause of the Constitution.

CONCLUSION

The Massachusetts and Connecticut statutes at issue in this case seek to establish an exclusionary regional banking zone in defiance of constitutional principles vital to the preservation of a harmonious federal system. Congress has not consented to or authorized this unprecedented arrangement. Nor has it even begun to consider and resolve the public policy questions raised by the threatened Balkanization of the nation's banking system. Accordingly, *amicus* respectfully maintains that this Court should reverse the decision of the court below and hold that the New England Compact is unauthorized by Congress and unlawful under the Commerce and Compact Clauses of the Constitution.

Respectfully submitted,

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN CORPORATION
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

* Counsel of Record

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No. 84-363

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

against

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and

BANK OF NEW ENGLAND CORPORATION,
CBT CORPORATION, HARTFORD NATIONAL
CORPORATION, THE COMMONWEALTH OF
MASSACHUSETTS, THE STATE OF CONNECTICUT and
BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION ON BEHALF OF THE DAVID F. BOLGER REVOCABLE TRUST FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

William A. Harvey
Counsel of Record for Amicus Curiae,
The David F. Bolger Revocable Trust
1401 Walnut Street
Philadelphia, PA 19102
(215) 568-6060

Of Counsel:
Edward S. Ellers
Rona J. Rosen
William R. Thompson
FELLHEIMER, EICHEN & GOODMAN
1401 Walnut Street
Philadelphia, PA 19102
Counsel for Amicus Curiae,
The David F. Bolger Revocable Trust

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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The David F. Bolger Revocable Trust hereby respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorneys

for the Petitioners Citicorp, Northeast Bancorp, Inc. and Union Trust Company has been obtained. The consent of the attorney for the Respondent The Federal Reserve Board has been obtained. The consent of the attorneys for the Intervenor-Respondent The Commonwealth of Massachusetts has been obtained. The consent of the attorneys for the Intervenor-Respondents The State of Connecticut, Bank of New England Corporation, CBT Corporation, Hartford National Corporation, and Bank of Boston Corporation was requested but refused.

The David F. Bolger Revocable Trust ("The Bolger Trust"), is a trust formed and existing under the laws of the State of New Jersey. The Bolger Trust is the owner of 107,300 shares or approximately 5% of all the outstanding common stock of RIHT Financial Corporation ("RIHT"). RIHT is a bank holding company within the meaning of Section 2(a)(1) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841 *et seq.* ("BHCA"), with its principal place of business in Rhode Island. On August 20, 1984, the Board of Governors of the Federal Reserve System approved the acquisition of RIHT by Bank of Boston Corporation ("BBC"), a bank holding company within the meaning of Section 2(a)(1) of the BHCA with its principal place of business in Massachusetts ("BBC-RIHT Merger"). The BBC-RIHT Merger is being effected pursuant to two reciprocal regionally restrictive banking statutes, Mass. Gen. Laws Ann. ch. 167A §2 ("The Massachusetts Act") and R.I. Pub. Law S. 0661 Sub A ("The Rhode Island Act").

The interest of The Bolger Trust in this case arises from the fact that it is a party to cases presently pending in the United States Court of Appeals for the First Circuit, *Michael Biszko, Jr., et al. vs. RIHT Financial Corp., et al.*, No. 84-1579, and in the United States Court of Appeals for the Second Circuit, *The David F. Bolger Revocable Trust vs. Board of Governors of the Federal Reserve System*, No. 84-4141, challenging the BBC-RIHT Merger. Those cases involve the same issue as is before

the Court in this case, namely, the constitutionality of a merger based on regionally restrictive interstate banking statutes. The Massachusetts Act, one of the statutes upon which the BBC-RIHT Merger is grounded, is being challenged in the instant case. BBC, the prospective acquiror in the BBC-RIHT Merger, is an Intervenor-Respondent in the instant case.

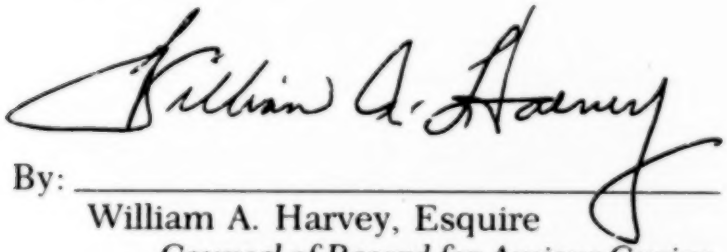
A substantial number of bank holding companies are public companies owned by large numbers of shareholders, such as the proposed *Amicus Curiae*, The Bolger Trust. The shareholders of those bank holding companies have interests unrepresented by the Petitioners, who represent only the interests of competing banks and bank holding companies. Indeed, the interest of the competing banking institutions is to penetrate and obtain a share of the market, not to maximize share values of potential targets. In fact, it is in an acquiring bank's best interest that the acquiree's stock price be depressed. The shareholders of targeted bank holding companies, on the other hand, seek to maximize the value of their investment and realize as high a price as possible for their stock. Accordingly, the interests of the *Amicus Curiae* are not identical to that of the Petitioners and are not well represented by the Petitioners' brief below.

The Bolger Trust seeks to demonstrate in its Brief that regionally restrictive interstate banking statutes harm the shareholders of bank holding companies, who would otherwise benefit from the opportunities afforded by non-discriminatory interstate banking. Specifically, the discriminatory interstate banking statutes affect the market value of the shareholders' property by limiting the attractiveness and value of their stock, by limiting the number of potential acquirors of bank holding companies thereby lessening competition and necessarily resulting in a lower acquisition price, and by limiting or impairing the ability of the bank holding companies to raise capital.

The Petitioners did not argue in the Court of Appeals the effect of the discriminatory interstate banking compacts on shareholders. Since it is likely that the Petitioners will pursue the same course in this Court, it is believed that the brief which the proposed *Amicus Curiae* is requesting permission to file will contain a more complete argument as it relates to shareholders. If this argument is accepted it would be dispositive of the case.

WHEREFORE, The David F. Bolger Revocable Trust respectfully requests leave of this Court to file the attached brief as an *Amicus Curiae*.

Respectfully submitted:



By: _____

William A. Harvey, Esquire
Counsel of Record for Amicus Curiae,
The David F. Bolger Revocable Trust
1401 Walnut Street
Philadelphia, PA 19102
(215) 568-6060

Of Counsel:
Edward S. Ellers
Rona J. Rosen
William R. Thompson
FELLHEIMER, EICHEN & GOODMAN
1401 Walnut Street
Philadelphia, PA 19102
Counsel for Amicus Curiae,
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William A. Harvey
Counsel of Record for Amicus Curiae, The David F. Bolger Revocable Trust
1401 Walnut Street
Philadelphia, PA 19102
(215) 568-6060

Of Counsel:
Edward S. Ellers
Rona J. Rosen
William R. Thompson
FELLHEIMER, EICHEN & GOODMAN
1401 Walnut Street
Philadelphia, PA 19102
Counsel for Amicus Curiae, The David F. Bolger Revocable Trust

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INTEREST OF THE *AMICUS CURIAE*

The David F. Bolger Revocable Trust ("The Bolger Trust") is a trust formed and existing under the laws of the State of New Jersey. The Bolger Trust is the owner of a 107,300 shares or approximately 5% of all the outstanding common stock of RIHT Financial Corporation ("RIHT"). RIHT is a bank holding company within the meaning of Section 2(a)(1) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841, *et seq.* ("BHCA"), with its principal place of business in Rhode Island.

On August 20, 1984, the Board of Governors of the Federal Reserve System approved the acquisition of RIHT by Bank of Boston Corporation ("BBC"), a bank holding company within the meaning of Section 2(a)(1) of the BHCA, with its principal place of business in Massachusetts ("BBC-RIHT Merger"). The BBC-RIHT Merger is being effected pursuant to two reciprocal regionally restrictive banking statutes, Mass. Gen. Laws Ann. ch. 167(a) §2 ("The Massachusetts Act") (Pet. A101)[1] and R.I. Pub. Law S. 0661 Sub. A ("The Rhode Island Act") (Pet. A103). The Rhode Island Act took effect on July 1, 1984, and, from its effective date until July 1, 1986, permits only New England (i.e., Massachusetts, Maine, Rhode Island, New Hampshire, Connecticut or Vermont) bank holding companies to acquire Rhode Island banks, and only if the New England state in which the principal operations of the acquiring bank holding company are conducted has granted reciprocal rights to Rhode Island bank holding companies. Under the Rhode Island Act, and to the extent reciprocal provi-

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1. The Massachusetts Act, part of the New England Compact, is being challenged in the case before the Court as it authorizes the mergers of Bank of New England Corporation "BNE" and CBT Corporation "CBT", Hartford National Corporation "HNC" and Arltru Bancorporation, Inc. "Arltru", and Bank of Boston Corporation "BBC" and Colonial Bancorp, Inc. "Colonial".

sions have been enacted by other New England states, bank holding companies which have their principal places of business in and which are not owned by a company with its principal place of business outside of New England would be allowed to establish and/or acquire direct or indirect control of full service banks as defined in Section 2(c) of the BHCA in Rhode Island. Bank holding companies which are not based in New England are necessarily precluded from acquiring bank holding companies based in New England, such as RIHT.

The Rhode Island Act will, at least during the two year period between 1984 and 1986, be found to meet the reciprocity provisions of 1983 Conn. Act 83-411 ("Connecticut Act") (Pet. A97)[2] and the Massachusetts Act. Likewise, the Connecticut and Massachusetts Acts will be found to meet the reciprocity provisions of the Rhode Island Act. Significantly, the Rhode Island Act, unlike the Connecticut and Massachusetts Acts, authorizes complete reciprocal interstate banking in Rhode Island after July 1, 1986.

The Bolger Trust is vitally interested in the constitutional questions involved in the instant case as they relate to the regionally restrictive interstate banking statutes. Indeed, The Bolger Trust is a party to cases challenging the constitutionality of the BBC-RIHT Merger and the Rhode Island Act, presently pending in the United States Courts of Appeals for the First Circuit, *Michael Biszko, Jr., et al. v. RIHT Financial Corporation, et al.*, No. 84-1579, and in the United States Court of Appeals for the Second Circuit, *The David F. Bolger Revocable Trust v. Board of Governors of the Federal Reserve System*, No. 84-4141.

Shareholders of New England bank holding companies subject to regionally restrictive interstate banking

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2. The Connecticut Act, part of the New England Compact, is also being challenged in the case before the Court for the reasons set forth in footnote 1, *supra*.

statutes, such as The Bolger Trust, are injured by the irrational geographic limitations imposed by these statutes on non-New England banking institutions and companies, in ways separate and distinct from the harm claimed by banking institutions, such as Petitioner Citicorp, who are excluded from competition by the challenged Acts. Those excluded institutions are interested in penetrating and attaining a share of the New England market. In contrast, shareholders of targeted New England banking institutions seek to maximize the value of their investment and realize as high a price as possible for their stock.

The Massachusetts, Connecticut and Rhode Island Acts' insulation of New England banks from acquisition by non-New England banks directly harms shareholders, such as *Amicus Curiae,* by limiting the number of potential acquirors for targeted bank holding companies such as RIHT. This limitation on competition necessarily results in a lower acquisition price being paid by acquiring banks for New England bank stock than would be the case if there were no regional restrictions on competition. In reality, few New England banking institutions are financially able to acquire other New England bank holding companies. Therefore, the opportunity for acquisition afforded by the New England regionally restrictive statutes hardly creates a competitive situation. A non-New England institution may be interested in acquiring companies in Rhode Island as well as in Massachusetts and Connecticut, because of those states' proximity to one another or for business reasons that transcend geographical boundaries. A non-New England bank interested in merging with a New England bank is precluded from doing so by the challenged Acts. Absent the regionally restrictive provisions, the shareholders of New England banks would have more and better offers for their stock. A larger pool of potential acquirors would increase the value of a targeted New England bank's stock.

The discriminatory interstate banking statutes likewise harm shareholders such as *Amicus Curiae* by limiting or impairing the ability of New England bank holding companies to raise capital, thereby affecting and limiting the stock's value. A primary means by which a company, be it a bank or manufacturer, raises capital is through equity offerings. There exists only a finite amount of capital available for investment for which all companies compete. An investor, when choosing where to invest his capital, evaluates where, in the long or short run, he will realize the highest yield and/or the greatest appreciation. Clearly, in light of the recognized inevitability of full interstate banking (Pet. A150-161), the Massachusetts, Connecticut and Rhode Island Acts render New England bank holding companies less attractive to investors than other banking institutions which come to the market without restrictive geographic baggage. More capital investors would choose to invest in a banking institution which will be able to reap the benefits of full interstate banking rather than one, such as RIHT, which might be acquired under the imprimatur of the New England Compact prior to full interstate banking.

The challenged Acts' regional restrictions also impair the market value of the shareholders' property by lessening the attractiveness of their stock as an investment. As discussed above, the regional restraints impair a New England bank holding company's ability to raise capital and, because of the absence of substantial competition, to command receipt of the best possible acquisition price. Thus, the stock of a bank holding company unaffected by the restraints of the New England Compact will be a more attractive investment than stock of an affected company. The greater attractiveness impacts on the stock's market value. Moreover, the discriminatory regional restrictions weaken the resolve and ability of incumbent management to maximize the value of the shareholders' stock, to resist inadequate offers, and to at-

tain the best possible offer. Under the existing reciprocal legislative scheme, there are only a limited number of potential acquirors. Thus, a targeted bank subject to the New England Compact has limited options to fend off an unwanted tender offer. Were acquisitions not subject to regional restrictions, a wider universe of "white knights" would exist to which a targeted bank could turn to maximize the amount to be received for the company's stock.

For the reasons set forth above, *Amicus Curiae* is affected by the regionally restrictive Massachusetts, Connecticut and Rhode Island Acts, in a manner separate and distinct from Petitioners. Accordingly, *Amicus Curiae* believes it is in a position to bring to the Court's attention added insight, which will enable the Court to find that the regionally restrictive interstate banking statutes are unconstitutional.

ARGUMENT

I. The Massachusetts and Connecticut Acts Violate the Commerce Clause

A. THE REGIONALLY RESTRICTIVE STATUTES CONSTITUTE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States. . . ." U.S. Const., art. I, §8, cl.3. By implication, the Commerce Clause has been interpreted to limit the power of the states to interfere with or impose burdens on interstate commerce. *Western and Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 648, 652, 101 S.Ct. 2070, 2075 (1981). Absent congressional action authorizing a particular state regulation affecting interstate commerce, the courts may properly decide whether such a state regulation imposes improper burdens on interstate commerce. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, *reh. denied*, 450 U.S. 1027, 101 S.Ct. 1735 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978). In evaluating the constitutionality of state legislation under the Commerce Clause, the central principle which underlies the Commerce Clause, namely the strong federal interest in preventing economic balkanization, must be considered. *Bacchus Imports, Ltd. v. Dias*, ____ U.S. ____, 104 S.Ct. 3049, 3058 (1984). That principle was articulated by the Court in *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1731 (1979), as follows:

> The few simple words of the Commerce Clause — 'The Congress shall have power . . . To regulate Commerce . . . among the several States . . .' — reflected a central concern of the framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed,

> the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

In *Hughes*, the Court cited to *H.P. Hood and Sons, Inc., v. Du Mond*, 336 U.S. 525, 537-538, 69 S.Ct. 657, 665 (1949), where it had said:

> This principle that our economic unit is the Nation, which alone has the gamet of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527, 55 S.Ct. 497, 502, 79 L.Ed. 1032, 101 A.L.R. 55, 'What is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation.'

So important is the principle that states are not "separable economic units" that there exists a virtual *per se* rule of unconstitutionality regarding any state statute which has simple economic protectionism rather than the safeguarding of the health and safety of a state's people as its goal. *Philadelphia v. New Jersey, supra*, 437 U.S. at 623-624, 98 S.Ct. at 2535; *H.P. Hood and Sons v. Du Mond, supra*, 336 U.S. at 538, 69 S.Ct. at 655; *Toomer v. Witsell*, 334 U.S. 385, 403-406, 68 S.Ct. 1156, 1165-1167 (1948); *Baldwin v. G.A.F. Seelig, supra*, 294 U.S. at 527, 55 S.Ct. at 502; *Buck v. Kuykendall*, 267 U.S. 307, 315-316, 45 S.Ct. 324, 325-326 (1925). A finding that state legislation constitutes economic protectionism may be made on the basis of discriminatory purpose, *see Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53, 97 S.Ct. 2434, 2446-47 (1977), or on the basis of discriminatory effect. *Bacchus Imports, Ltd. v. Dias, supra*, ____ U.S. at ____, 104

S.Ct. at 3055. Legislation has a discriminatory effect where it "overtly blocks the flow of interstate commerce at a state's borders." *Philadelphia v. New Jersey, supra,* 437 U.S. at 624, 98 S.Ct. at 2535, *citing Welton v. Missouri,* 91 U.S. 275 (1876); *Minnesota v. Clover Leaf Creamery Co., supra,* 449 U.S. at 471, n. 15, 101 S.Ct. at 727, n. 15.

A more flexible approach under the Commerce Clause is allowed only where legitimate state objectives are credibly advanced, there is no patent discrimination against interstate trade, and the effect on interstate commerce is incidental. *See Philadelphia v. New Jersey, supra,* 437 U.S. at 624, 98 S.Ct. at 2535. The more flexible test is articulated in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970) as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See, also, Hughes v. Oklahoma, supra, 441 U.S. at 331, 99 S.Ct. at 1733-34. Thus, only where the party averring the validity of a state law establishes some legitimate state purpose other than the protection of local business will the Court apply a balancing test, measuring whether some legitimate state purpose is served which outweighs the incidental interference with interstate commerce and whether some less burdensome alternative might not exist to accomplish the same purpose.

The Massachusetts, Connecticut, and Rhode Island Acts are economic protectionist measures. An examination of the states' purpose in enacting those Acts demonstrates that the states are not entitled to the flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. *See Bacchus Imports, Ltd. v. Dias, supra,* ____ U.S. at ____, 104 S.Ct. at 3055. The stated purpose of the New England legislatures was to block trade at their borders as to non-New England banking institutions, so as to enable Massachusetts, Connecticut, and Rhode Island banking institutions to grow and strengthen themselves on a regional basis before full interstate banking and competition with money center banks becomes a reality (Pet. A150-161). The Acts, in addition to their discriminatory purpose, have a discriminatory effect: preclusion of non-New England banking institutions, such as Petitioner Citicorp, from competing on an equal footing with other bank holding companies in the acquisition of Massachusetts, Connecticut and Rhode Island banks, and preclusion of stockholders of New England banking institutions, such as *Amicus Curiae* The Bolger Trust, from maximizing the value of their investment. This discriminatory effect is more than merely incidental. In fact, Respondent Board has conceded that, absent congressional authorization to the contrary, the statutes in question constitute the kind of burden on interstate commerce "of the type that would be found by the Courts to violate the Commerce Clause" (Pet. A58).

Moreover, neither the Acts nor their legislative history evidence a credible legitimate local public purpose such as the furtherance of the health or safety of the general citizens of Massachusetts, Connecticut, or Rhode Island. The New England legislatures gave no attention to the question of whether the interest of those states' citizens in the greatest variety of high quality banking services would best be served by regionally re-

strictive statutes.[3] No evidence has been offered to demonstrate that a Massachusetts bank holding company can better appreciate the needs of Connecticut citizens than could a New York bank holding company. As humorously but aptly stated by John D. Hawke, Jr.,[4] in the article, *Are State Laws Permitting Interstate Banking Constitutional?*, American Banker (Dec. 15, 1982), "A shared taste for milky clam chowder may not be sufficient to warrant discrimination against those favoring the tomato based variety." (Pet. A180). Indeed, it would appear that the many Connecticut citizens who work in New York would be better served by a New York bank holding company, in that they could handle their banking transactions through one institution both at their place of residence and their place of business. This fact was plainly recognized by economist and banking expert Carter H. Golembe, who said that "there would appear to be a much closer economic relationship between Connecticut and New York than between Connecticut and Massachusetts when it comes to local banking markets . . . ." (Pet. A219). The regionally restrictive statutes disqualify companies from acquiring or establishing Rhode Island, Connecticut and Massachusetts banks solely on the basis of the location of the principal place of business of the acquiring company or its parent company. The Acts premise entry into New England's banking markets not on specific determinations of whether a potential ac-

3. Other than giving lip service to the special concern exhibited by New England banks for New England citizens, the legislatures cite no credible examples to support that theory. Interestingly, while the New England legislatures recognize that full interstate banking already exists in their states as far as non-banking financial institutions are concerned (e.g. money market funds) (Pet. A154-155), they do not cite one example of any harm which non-New England financial service organizations have caused their citizens, or a lower level of service than that afforded by New England financial service organizations.

4. Mr. Hawke served as General Counsel to the Board of Governors of the Federal Reserve System from 1975-1978.

quisition will benefit local concerns, but rather on an intra-regional system of reciprocal trade privileges. The intent of the Acts is not to promote the availability of the most beneficial banking services for citizens of New England states, but rather to insulate local financial institutions, while disparately treating out-of-state banking institutions.

The Massachusetts, Connecticut and Rhode Island Acts' interference with interstate commerce injures not only banking institutions outside the protected geographic area, but also, as stated above, shareholders of bank holding companies in the protected geographic area. Like a rock dropped in a great pond, the interference has effects which ripple out from the scene of the splash itself, and touch and change everything and everyone caught up in the flow of commerce. No attention was given by the New England legislatures to the interests of shareholders in maximizing the value of their investment as opposed to the interests of incumbent managements in perpetuating their tenure.

The Acts in question are distinguishable from those statutes enacted in other states which permit restricted or conditional entry of out-of-state bank holding companies based on conditions, such as limitations on activities, number of offices and home office locations.[5] Some legitimate state purpose is evident from those statutes, i.e., gaining employment for local residents and tax revenues without seriously affecting competing local banking institutions. Delaware and the other states cited in footnote 5, *supra*, opened up their borders to credit card operations from every state of the Union, subject to conditions requiring, for instance, the maintenance of certain offices in certain locations or of a certain size. Those conditions, though creating a burden on interstate com-

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5. *See, e.g.*, Neb. Rev. Stat. §8-903 (Supp. 1983); Del. Code Ann. tit. 5, §803; Md. Fin. Inst. Code Ann. §5-901; S.D. Compiled Laws Ann. §§51-16-40 to 51-16-44 (Supp. 1984).

merce, do not create an unacceptable burden and neither favor nor preclude a particular region's bank holding companies from participating provided that they meet the otherwise reasonable conditions.

Respondents relied heavily in the court below upon the case of *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), which upheld a statute that afforded out-of-state bank holding companies already controlling two or more banks in Iowa and already having demonstrated their commitment to the community the right to expand and make additional acquisitions.[6] As the court in *Iowa Independent Bankers* said, it was "perfectly rational" for the Iowa legislature to decide to retroactively permit the entrance of an out-of-state bank holding company which had already "proven itself to be a positive force" in the state banking industry without at the same time opening the state up to "wholesale entry into the Iowa market" by out-of-state bank holding companies. *Id.*, 511 F.2d at 1294. That case is clearly distinguishable from the instant one where there exists no rational relationship between the welfare of the citizens of New England and the creation of a New England banking region.

If, indeed, the concern of the Massachusetts, Connecticut, and Rhode Island legislatures, in enacting the challenged Acts, was to protect their citizens and insure for them a high level of banking service, those concerns could have been addressed in a manner resulting in far less impact on interstate commerce. For instance, the states could require, as a condition to entry, that a certain amount or level of services be afforded to their citizens. The Board has admitted that concerns over the influence of large banking entities entering the New England market could have been less drastically addressed by statutes directed to the size of prospective

6. Iowa Code Ann. §524.1805.

out-of-state bank holding companies (Pet. A61). The Board itself noted that "it would appear that such statutes [as distinguished from those enacted by the other states discussed in footnote 5, *supra*, and accompanying text] might be viewed as imposing substantially less of a burden on commerce in the furtherance of legitimate state objectives than [the Connecticut Act, and, by implication, the Massachusetts Act] impose[s]." (Pet. A70).

The Massachusetts, Connecticut, and Rhode Island Acts are protectionist measures of the type which the Court addressed in the analogous case of *Lewis v. BT Investment Managers*, 447 U.S. 27, 100 S.Ct. 2009 (1980). In *Lewis*, a Florida statute aimed at restricting the ability of out-of-state bank holding companies to compete in Florida's financial market, was found by the Court to "display a local favoritism or protectionism that significantly alters its Commerce Clause status." *Id.*, 447 U.S. at 42, 100 S.Ct. at 2018. This is precisely the kind of "simple economic protectionism" for which "a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624, 98 S.Ct. at 2535. The Court did not feel the need to actually pronounce the similar activity in *Lewis* a *per se* violation only because it had already determined that the discriminatory treatment accorded out-of-state bank holding companies could not be justified under any less stringent test under the Commerce Clause. *Amicus Curiae* submits that the instant protectionist legislation warrants a *per se* finding of unconstitutionality.

B. THE DOUGLAS AMENDMENT DOES NOT AUTHORIZE THE MASSACHUSETTS AND CONNECTICUT ACTS

Because these regionally restrictive interstate banking statutes impermissibly burden interstate commerce, they can survive constitutional challenge only if there exists some grant of authority by Congress itself for their

enactment. Respondents, in an attempt to establish congressional authorization for the blatant violation of the Commerce Clause presented by the New England legislation, must demonstrate congressional intent that is obvious and unarguable. As the Court said in *South-Central Timber Development, Inc. v. Wunnicke*, ____ U.S. ____, ____, 104 S.Ct. 2237, 2242 (1984):

> [F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.

See, also, Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S.Ct. 1096 (1982). Obvious and unmistakable congressional intent cannot be gleaned from vague legislative history. This Court has repeatedly warned of the dangers inherent in such unwarranted reliance on the fragile wisps of evidence regarding Congress' mind often found in legislative history. *See, e.g., New England Power Co. v. New Hampshire, supra; Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, *reh. denied*, 430 U.S. 976, 97 S.Ct. 1668 (1977).

In the instant case, Respondents contend that congressional authority for the regionally restrictive legislation is found in the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d). However, they can point to no "unmistakably clear" language anywhere, and certainly not in the Douglas Amendment itself, to show an intention by Congress to authorize such protectionist state legislation.

The Douglas Amendment does nothing more than provide that no bank holding company may acquire a bank in another state unless the acquisition of such a

bank "is specifically authorized by the statute laws of the State in which such bank is located. . . ." It does not constitute Congress' grant of authority to the states to irrationally discriminate against each other as they see fit.

The minimal legislative history available in connection with the Douglas Amendment, likewise, does not demonstrate any obvious and unarguable congressional intent in 1956 to sanction the kind by discriminatory and protectionist legislation now before the Court (Pet. A111-115). Only the wildest speculation regarding Congress' probable intentions could result in the conclusion that Congress ever contemplated the sort of regionally restrictive legislation embodied in the Massachusetts, Connecticut, and Rhode Island Acts. In fact, it is clear from the legislative history of the BHCA that it was intended to operate free of discrimination (Pet. A107-110).

The Respondents seek to avoid the force of *South-Central Timber Development, supra,* by emphasizing the fact that the Massachusetts and Connecticut Acts are within the literal terms of the Douglas Amendment, unlike the situation in *South-Central Timber* where the state sought to find authorization for its restrictive conduct by looking to federal policy in analogous areas (Brief for the Board Respondent in Opposition to Petition for Writ of Certiorari at P. 8; Brief of Intervenor-Respondents in Opposition to Petition for Writ of Certiorari at P. 21). Contrary to their assertion, the Douglas Amendment does not specifically authorize the Massachusetts, Connecticut, or Rhode Island legislatures to permit interstate bank acquisitions based on regional restrictions. If the Court were to find that the Douglas Amendement was a *carte blanche* grant by Congress to the states, it would also have to find that Congress granted authority to Illinois, California and New York, where many money center banks are located, to enact regionally restrictive statutes in support of each other and to the detriment of other states, such that they could not participate in the

megabank system the money center states could then construct. Clearly, such an intention cannot be found in the Douglas Amendment.

The Court, in *Lewis, supra*, recognized the very limited grant of authority contained in the Douglas Amendment when it said:

> The only authority granted to the States [by the Douglas Amendment] is the authority to create exceptions to this general prohibition [against interstate bank acquisitions], that is, to *permit* expansion of banking across state lines where it would otherwise be federally prohibited.

Id., 447 U.S. at 47, 100 S.Ct. at 2021 (emphasis by the Court). The cases of *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, supra*, and *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1708 (1984), discussing *Iowa Independent Bankers* in *dicta*, relied upon below by Respondents, do not support the proposition that the Douglas Amendment authorizes discrimination against out-of-state bank holding companies based upon their geographic locations.[7] The court in *Iowa Independent Bankers* only needed to decide and only did decide that the Douglas Amendment did not prohibit states from chosing an alternative to an all-or-nothing approach to interstate bank acquisitions. It did not decide that the Douglas Amendment, in some positive sense, authorized alternatives which were overtly protectionist.

Likewise, Respondents cannot find support for their interpretation of the Douglas Amendment in the existence of the state legislation permitting the restricted or

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7. The Circuit Court for the District of Columbia in *Iowa Independent Bankers* considered the Douglas Amendment in connection with a claim under the Equal Protection Clause, which, in the absence of a suspect classification, accomodates a more liberal standard of review than the Commerce Clause.

conditional entry of out-of-state bank holding companies discussed above in footnote 5, *supra,* and accompanying text. Those conditional statutes clearly attempt to serve valid state interests such as employment of local residents, commitment to the local community, and the generation of tax revenue and do not grant geographic favors to one outside state over another. They can pass constitutional muster under an ordinary Commerce Clause analysis without authorization by the Douglas Amendment. The Massachusetts, Connecticut, and Rhode Island Acts cannot, as the regional restrictions contained therein bear no reasonable relation to acceptable local concerns. Rather, the New England legislation serves only to create an absolute geographic barrier to economic participation in the New England banking industry. Thus, the existence of other conditional statutes provides no support for the proposition that Congress intended to authorize regionally restrictive acts by its passage of the Douglas Amendment.

Accordingly, the regionally restrictive conditions attached to the Massachusetts, Connecticut, and Rhode Island legislatures' grant of authority to acquire an in-state bank must survive an analysis under the general principles of the Commerce Clause, on its own terms and without any help from the Douglas Amendment. As is plainly demonstrated above, the New England Acts fail to survive such a test.

II. The Massachusetts and Connecticut Acts Violate the Compact Clause

The Massachusetts and Connecticut Acts, in addition to violating the Commerce Clause, constitute an impermissible attempt by the New England states to "enter into [an] Agreement or Compact with another State . . . " carried out "without the Consent of Congress . . . " U.S. Const. art. I, §10, cl. 3. Indeed, the history of the Acts, and of the meetings and discussions which preceeded their passage, establish, and the Respondent Board and

the Court of Appeals for the Second Circuit have found, that the Acts represent an "agreement" or "compact" to create a regional banking zone. *See*, Pet. A51; *Northeast Bancorp., Inc. v. Board of Governors of the Federal Reserve System*, 740 F.2d 203, 209 (2d Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S.Ct. 776 (1985).

While not every agreement or compact lacking Congress' consent is violative of the Compact Clause, it is well settled that those "agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States' " are violative of the Compact Clause *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471, 98 S.Ct. 799, 812 (1978), *quoting New Hampshire v. Maine*, 426 U.S. 363, 369, 96 S.Ct. 2113, 2117 (1976), *quoting Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734 (1893). The instant compact is so directed to a formation of a combination tending to increase the political powers of the states. It not only ignores significant federal interests in banking in general and interstate banking in particular, but also seeks to create an intermediate banking system which amounts to a political confederation inconsistent with notions of federal supremacy that harken back to the Constitutional Convention itself. No one has had the temerity to suggest that the Douglas Amendment constitutes the consent of Congress to such an agreement which is otherwise within the prohibition of the Compact Clause.

The blow dealt by this Compact Clause violation falls heavily not only upon competitors like Petitioner Citicorp, but upon the shareholders of New England bank holding companies like *Amicus Curiae* as well. The compact created by the New England legislatures, in ways more fully detailed above, deprives shareholders like *Amicus Curiae* of the full value of their shares by limiting the attractiveness of those shares as an investment, by limiting the number of potential acquirors of

the affected companies and thereby resulting in a lower selling price on the open market and by eroding the ability of New England bank holding companies in which such shares may be owned to secure new capital. Furthermore, from the standpoint of New England bank shareholders like *Amicus Curiae,* whose potential share values are eroded by the limitation on their marketability caused by the instant Acts, these Acts interfere with an additional federal interest, one clearly recognized as a fundamental part of the securities acts, namely the free and open marketability of shares held in public reporting companies such as those engaged in the instant mergers.

The sort of compacts or agreements which historically have been found acceptable under the Compact Clause are quite different from the instant compact. Those other compacts constituted laudable attempts by states to band together for purposes such as the control of pollution,[8] the fair allocation of water rights,[9] the management of a regional transportation system,[10] the construction and maintenance of bridges,[11] the promotion of uniformity and compatibility in state tax systems and the proper determination of state and local tax liability among multistate taxpayers,[12] and so on. Economic balkanization of the type described with fear by the Court in *Hughes v. Oklahoma, supra,* 441 U.S. at 325-26, 99 S.Ct. at 1737, and planned here by the New England states, is not a fit purpose for any compact or agreement.

While the law has entertained, throughout this nation's history, arguments in favor of "state's rights," it

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8. *State ex rel. Dyer v. Sims,* 341 U.S. 22, 71 S.Ct. 557 (1951).

9. *Texas v. New Mexico,* 462 U.S. 554, 103 S.Ct. 2558 (1983).

10. *Washington Metropolitan Area Transit Authority v. One Parcel of Land,* 706 F.2d 1312 (4th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 238 (1983).

11. *Delaware River Joint Toll Bridge Comm. v. Colburn,* 310 U.S. 419, 60 S.Ct. 1039 (1940).

12. *United States Steel Corp. v. Multistate Tax Comm., supra.*

has never recognized the notion of regional rights accruing to groups of states. To allow the multi-state arrangement conceived of by the New England legislatures would operate to the detriment not only of the excluded states but to the federal government as well. Such an arrangement interferes with interstate commerce, undermines national economic goals, and constitutes an encroachment hostile to clearly recognized federal interests in interstate banking and in the free flow of interstate commerce itself. As such, the New England Compact stands in violation of the Compact Clause.

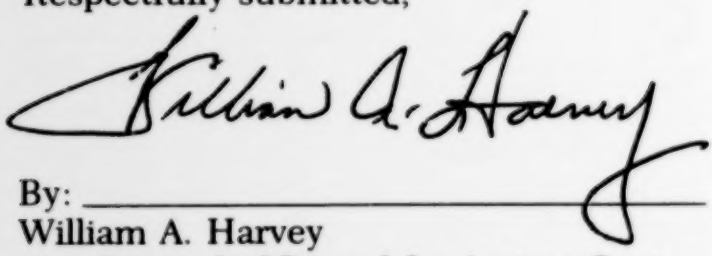
Even the Respondent Board recognized the highly complex nature of the whole issue of interstate banking and the potential danger that could result from dividing the nation into discrete banking regions (Pet. A47). As the Board said: "The Board believes that the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action." (Pet. A47-48). The proper course of action for the New England legislatures is a time-honored one: let the New England states form a compact and seek the approval of Congress. If there are legitimate regional interests to be served in restricting out-of-state bank acquisitions to specific regions, and a way of doing so without any challenge to federal supremacy, then let Congress be the judge and describe the parameters within which such a system might operate. In the absence of congressional consent, the instant Acts constitute an encroachment upon important federal interests that are plainly violative of the Compact Clause.

CONCLUSION

For the reasons argued more fully above, *Amicus Curiae* urges the Court to overturn the decision of the Court of Appeals for the Second Circuit and to find the Massachusetts and Connecticut Acts to be in violation of

the Commerce and Compact Clauses of the United States Constitution.

Respectfully submitted,



By: _____
William A. Harvey
Counsel of Record for Amicus Curiae,
The David F. Bolger Revocable Trust

1401 Walnut Street
Philadelphia, PA 19102
(215) 568-6060

Of Counsel:

Edward S. Ellers
Rona J. Rosen
William R. Thompson
Fellheimer, Eichen & Goodman
1401 Walnut Street
Philadelphia, PA 19102
Counsel for Amicus Curiae,
The David F. Bolger Revocable Trust

CERTIFICATION OF SERVICE

I, William A. Harvey, counsel of record for the *Amicus Curiae* herein, hereby certify that all parties required to be served have been served in the following manner: that on the 21st day of February, 1985, I caused to be served three (3) copies of the attached Brief *Amicus Curiae* and the accompanying Motion for Leave to File *Amicus* Brief by first class mail, postage pre-paid, to the following:

Stuart C. Stock, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

Ira M. Millstein, Esquire
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

George D. Reycraft, Esquire
Cadwalder, Wickersham & Taft
One Wall Street
New York, NY 10005

Wilmot T. Pope, Esquire
Choate, Hall and Stewart
60 State Street
Boston, MA 02109

Jamie W. Katz, Esquire
Assistant Attorney General
of the Commonwealth of Massachusetts
Dept. of the Attorney General
John W. McCormack
State Office Building
One Ashburton Plaza
Boston, MA 08108

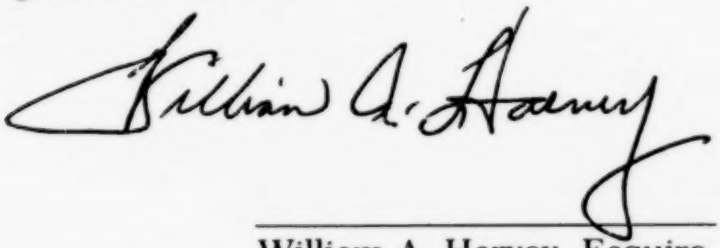
Bertram M. Kantor, Esquire
Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, NY 10171

Douglas M. Kraus, Esquire
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, NY 10022

Honorable Rex E. Lee
Solicitor General
Department of Justice
Room 5143
Washington, DC 20530

Joseph I. Lieberman, Esquire
Attorney General
State of Connecticut
Office of the Attorney General
30 Trinity Street
P.O. Box 120
Hartford, CT 06101
Attn: John G. Haines, Esquire
Assistant Attorney General

James E. Scott, Esquire
Staff Attorney
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave., N.W.
Washington, D.C. 20551



William A. Harvey, Esquire

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., *et al.*,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE BANK OF NEW YORK COMPANY, INC. AS *AMICUS CURIAE*

JOHN L. WARDEN
Counsel for The Bank of New York Company, Inc., Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-3610

H. RODGIN COHEN
MICHAEL STRAUS
SULLIVAN & CROMWELL

JAMES F. MATTHEWS
DAVID T. HALVORSON
THE BANK OF NEW YORK COMPANY, INC.
Of Counsel

February 21, 1985

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IN THE

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NORTHEAST BANCORP, INC., *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Bank of New York Company, Inc. ("Bank of New York") respectfully moves pursuant to Rules 36.3 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* supporting neither petitioners nor respondents. Although petitioners, the Solicitor General, and two of the non-federal respondents have consented to the filing of the brief, three of the non-federal respondents have declined to do so.

As more fully explained in the brief under the heading "Statement and Interest of *Amicus Curiae*," Bank of New York is a New York-based bank holding company that

contracted to acquire the subsidiary banks of petitioner Northeast Bancorp, Inc., located in Connecticut, and applied to the Board of Governors of the Federal Reserve System ("Board") for approval of that acquisition. The Board denied approval, relying on its decision in this case. Bank of New York's petition for review is being held in the Second Circuit pending the Court's disposition of this case, which will almost certainly control the outcome in Bank of New York's case.

Bank of New York's position is that under the plain language of the Douglas Amendment, the Connecticut and Massachusetts statutes here in issue operate to permit the acquisition of Connecticut and Massachusetts banks by bank holding companies located in any State and, therefore, present no constitutional issue. Consequently, Bank of New York submits, both the transactions that are the subject of this case and its own proposed transaction may lawfully proceed. None of the parties advocates Bank of New York's position, which would enable the Court to dispose of this case without reaching the constitutional questions raised below.

Accordingly, Bank of New York prays that the Court grant this motion for leave to file its brief.

Respectfully submitted,

JOHN L. WARDEN
Counsel for The Bank of New York Company, Inc., Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-3610

H. RODGIN COHEN
MICHAEL STRAUS

SULLIVAN & CROMWELL

JAMES F. MATTHEWS
DAVID T. HALVORSON

THE BANK OF NEW YORK COMPANY, INC.

Of Counsel

February 21, 1985

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE BANK OF NEW YORK COMPANY, INC., AS *AMICUS CURIAE*

The Bank of New York Company, Inc. ("Bank of New York") submits this brief as *amicus curiae* to urge the Court to affirm on other grounds the judgment of the United States Court of Appeals for the Second Circuit, reported at 740 F.2d 203 (2d Cir. 1984). This Court can, by correctly reading the relevant statutory language, uphold the basic constitutional principles involved without reaching the constitutional issues raised below.[1]

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[1] The decision of the Second Circuit affirmed: the order of the Board of Governors of the Federal Reserve System (the "Board"), dated March 26, 1984, approving the merger of Bank of New

(footnote continued on following page)

Statutes Involved

The statutes involved are set forth in Petitioners' Briefs. The statute which is the principal focus of this brief is the "Douglas Amendment," Section 3(d) of the Bank Holding Company Act, 12 U.S.C. § 1842(d)(1982), which reads as follows:

> "Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 1823(f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the state laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest."

(footnote continued from preceding page)

England Corporation and CBT Corporation, 70 FED. RES. BULL. 374 (1984); the Board's order, also dated March 26, 1984, approving the acquisition by Hartford National Corporation of Arltru, Inc., 70 FED. RES. BULL. 353 (1984); and the Board's order, dated May 18, 1984, approving the acquisition by Bank of Boston Corporation of Colonial Bancorp, Inc., 70 FED. RES. BULL. 524 (1984) (together, the "Transactions").

Statement and Interest of *Amicus Curiae*

Bank of New York is a bank holding company registered under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (1982) (the "BHC Act"). Its principal subsidiary is The Bank of New York, a New York state trust company conducting a commercial banking business in New York. In February 1984, Bank of New York filed an application with the Board for approval to acquire the subsidiary banks of Northeast Bancorp, Inc. ("Northeast"), one of the petitioners in this case (the "BNY Application"). Northeast's subsidiary banks are located in Connecticut.

Bank of New York based its application on the Douglas Amendment, submitting that upon a proper reading of that provision, approval of the BNY Application had been authorized by Connecticut Public Act No. 83-411, "An Act concerning Interstate Banking" (the "Connecticut Interstate Act"), which authorized the acquisition of Connecticut banks by holding companies based in other New England States. Bank of New York contended that the plain meaning of the Douglas Amendment rendered state consent to entry by a bank holding company based in any other sister State consent to entry from all sister States, and that any attempt by a State to limit its consent to entry from particular States was, therefore, simply ineffective as a matter of federal statutory law. Bank of New York's application was denied by the Board by an order dated May 15, 1984, *Bank of New York Company, Inc.*, 70 FED. RES. BULL. 527 (1984), and a petition for review of the Board's decision, timely filed with the Second Circuit, is being held pending the Court's disposition of this case.[2]

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[2] The Board's Order is appended hereto as pages 1a-8a. Although it denied Bank of New York's application, the Board did not reject

(footnote continued on following page)

It is Bank of New York's position as *amicus curiae* here—as it was its position as applicant before the Board—that under the plain language of the Douglas Amendment, it is unnecessary for this Court to reach the constitutional issues decided below and raised in the Petition in order to decide this case. Because none of the parties has presented this position, Bank of New York respectfully submits this brief in aid of the Court's resolution of the important questions which have arisen as a result of the enactment of state regional banking statutes such as the two here in issue, the Connecticut Interstate Act and MASS. GEN. LAWS ANN. Ch. 167A, § 2 (Supp. 1984) (the "Massachusetts Interstate Act") (together, the "Interstate Acts").

Summary of Argument

Congress through enactment of the Douglas Amendment imposed a federal prohibition on the acquisition of banks located in one State by bank holding companies located in another. At the same time, Congress made provision in the Amendment for any State to remove the prohibition as to the acquisition of banks located in that State by enacting a statute specifically authorizing acquisition by "an out-of-State bank holding company."

(footnote continued from preceding page)

Bank of New York's analysis of the plain meaning of the Douglas Amendment. Instead, the Board simply chose to interpret the statute in a manner it termed consistent with prior "Board and judicial practice" so as to allow the States "to limit or restrict entry by out-of-state bank holding companies." (4a-7a). Nothing in the analysis advanced by Bank of New York before the Board and in this brief, however, would require disapproval of any transaction heretofore approved by the Board. On the contrary, as demonstrated *infra* at Points III and IV, Bank of New York's analysis is the only analysis which is fully consistent with the language of the BHC Act, the Board's prior practice, and the Board's approval of the Transactions.

Under the plain language of the Douglas Amendment, the absolute prohibition on such acquisitions imposed by Congress is lifted completely when a State authorizes local banks to be acquired by *any*, or a single, out-of-state bank holding company. Accordingly, in authorizing the acquisition of Connecticut or Massachusetts banks by out-of-state bank holding companies from certain other States—*i.e.*, in the language of the Douglas Amendment, to be acquired by "*an* out-of-State bank holding company"—the Interstate Acts eliminated the federal bar not only to the Transactions, but to the BNY Application and all similar transactions. Since the purported limitations in the Interstate Acts have no effect, they raise no constitutional issues regarding discrimination against sister States.

Although the decision of the court of appeals can be affirmed under a correct reading of the statute, its rationale and that of the Board cannot be accepted. Both erred in their reasoning in purporting to find in the Douglas Amendment an express authorization of discrimination on a regional basis and, therefore, in holding the Interstate Acts to be effective as geographically limited waivers of the Douglas Amendment's prohibition.

The Board also erred in assuming that a plain language reading of the Douglas Amendment would confront the States with an "all-or-nothing" choice in dealing with out-of-state bank holding companies. Even after removing the federal bar of the Douglas Amendment, a State may, under Section 7 of the BHC Act, 12 U.S.C. § 1846 (1982), exercise "a general power to enact regulations applicable to bank holding companies" in a manner consistent with the Commerce Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 48-49 (1980). Accordingly, state laws which regulate the activities of bank holding companies and are

not inconsistent with federal law may be valid either if they affect interstate and local holding companies equally, or if any "disparate burden" placed on interstate holding companies is only "incidental" and not excessive in relation to the local benefit secured. *Id.* at 43; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

ARGUMENT

I.

The Connecticut and Massachusetts Interstate Acts Operate Under the Douglas Amendment as Consents To Entry by Any Out-of-State Bank Holding Company.

The Douglas Amendment prohibits the Board from approving an application by a bank holding company to acquire the shares or assets of a bank located outside the State in which its subsidiaries principally conduct their operations. There is, however, an exception in circumstances where

> "the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

The Connecticut and Massachusetts Interstate Acts specifically authorize acquisitions of local banks by out-of-state bank holding companies, but by their terms purport to limit such permission to bank holding companies from designated States. It is these purported limitations which give rise to petitioners' constitutional challenge. Since the limitations are ineffective under the Douglas Amendment, however, the Interstate Acts are not constitu-

tionally infirm, and the Board's approval of the Transactions was proper.

A. Under the Plain Language of the Douglas Amendment, the Federal Ban on Interstate Acquisitions Is Lifted Once a State Authorizes an Acquisition by an Out-of-State Bank Holding Company.

It is the basic rule of statutory construction that a statute is to be read in accordance with its plain meaning. *See, e.g., Burns* v. *Alcala,* 420 U.S. 575, 580-81 (1975); *Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459, 465 (1968). This precept is rooted in the separation of powers doctrine, since for an administrative or judicial body to reshape Congress's words would improperly override legislation which Congress has enacted. 2A SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, § 45.09 at 29 (4th ed. 1973); *see also Heydon's Case,* 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Exch. 1584).

The phrase "acquisition . . . of *a* State bank by *an* out-of-State bank holding company" (emphasis supplied) as used in the Douglas Amendment plainly means acquisition by "*any*," or a single, out-of-state bank holding company. Under consistent judicial authority, the words "a" and "an" generalize the subject which they precede, and when used in a statute mean "any." *See, e.g., United States* v. *Hudson,* 65 F. 68 (W.D. Ark. 1894); *Brooks* v. *Zabka,* 450 P.2d 653, 655, 168 Colo. 265 (1969); *Lindley* v. *Murphy,* 56 N.E.2d 832, 838, 387 Ill. 506 (1944); *Lewis* v. *Spies,* 350 N.Y.S.2d 14, 17, 43 A.D.2d 714 (2d Dep't 1973); *Deschane* v. *McDonald,* 86 N.W.2d 518, 520 (N.Dak. 1973); *Doherty* v. *King,* 183 S.W.2d 1004, 1007 (Tex. Civ. App. 1944); BLACK'S LAW DICTIONARY 3-4 (4th ed. 1951). *See also First National Bank* v. *Missouri,* 263 U.S. 640, 657 (1924), in which this Court concluded that the reference in the National Bank Act to "*an* office or banking

house" meant a single office. Thus, once a State authorizes the acquisition of an in-state bank by *an* out-of-state bank holding company, the federally imposed bar is no longer in effect as to other acquisitions.

If Congress had intended in the Douglas Amendment to restrict out-of-state entry by such class distinctions as a State might impose, it would have been a simple matter to do so by using a restrictive modifier like "such" when referring to the terms on which state law might authorize entry by an out-of-state bank holding company.[3] For example, Congress could have used the word "such" instead of the word "an" as the modifier of "out-of-state bank holding company." The Douglas Amendment's state-law authorization clause would then have read: "unless the acquisition of such shares or assets of a State bank by *such* out-of-state bank holding company is specifically authorized . . . ." Alternatively, the subject of the state-law authorization clause could have been expressed concisely as "such acquisition," in place of the much longer phrase "the acquisition of such shares or assets of a State bank by an out-of-state bank holding company." The Douglas Amendment's authorization clause would then have read: "unless *such acquisition* is specifically authorized. . . . " In either case, the use of the word "such" might then have been construed as congressional authorization for States to specify particular acquirors on a nondiscriminatory basis.[4]

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[3] In contrast to words like "a" or "an," the word "such" does not generalize the subject which it precedes, but refers to a subject already particularized elsewhere. *See, e.g., Luciani* v. *Certified Grocers of Illinois, Inc.*, 245 N.E.2d 523, 527, 105 Ill. App. 2d 448 (1969); BLACK'S LAW DICTIONARY, *supra*, at 1600.

[4] Even had Congress followed either of these courses, the statute would not have expressed the unequivocal legislative consent necessary for it to be construed to authorize discrimination among sister States. *See* Point II, *infra*.

Congress knew how to use a restrictive word like "such" in the Douglas Amendment when it wanted to, since that very word appears four times in the text of the Amendment. Congress's first two uses of the word "such," before the state-law authorization clause, refer to the particular bank holding company whose application is before the Board, and contrast sharply with its later use of the generalized "an." The structure of the Amendment itself thus provides an explicit contrast between specific and general references to bank holding companies:

> "[No] application shall be approved under this section which will permit any bank holding company . . . to acquire . . . any additional bank located outside the State in which the operations of *such* bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which *such* company became a bank holding company, whichever is later, unless the acquisition . . . of a State bank by *an* out-of-State bank holding company is specifically authorized . . . ."

Congress's use of these two different modifiers in referring to out-of-state bank holding companies *requires,* as a matter of statutory construction, that the distinction be given effect. *See, e.g., Citizens & Southern National Bank* v. *Bougas,* 434 U.S. 35, 44 (1977). The distinction simply is that in the one instance, "such," Congress was referring to a particular bank holding company, and in the other, "an," to any bank holding company.

Further support for this conclusion is found in Congress's use twice of the word "such" in the state-law authorization clause itself:

> "unless the acquisition of *such* shares or assets of a State bank by *an* out-of-State bank holding company

> is specifically authorized by the statute laws of the State in which *such* bank is located . . . ."

Both uses of "such" appear in context with the phrase referring to "*an* out-of-State bank holding company." Congress chose not to use the word of specification "such" when referring to an acquiring bank holding company in the same clause in which it used that word of specification when referring to the state banks to be acquired. That drafting decision is strong evidence that Congress had no intent in the Douglas Amendment to limit the class of out-of-state bank holding companies to "such" bank holding companies as state law might authorize.

In short, it is simply not possible to interpret the word "an" as synonymous with "such" when the latter is used twice in the same clause for other purposes. It cannot be assumed that in between these two usages of that term, and only several words apart, Congress used another term, "an," and yet intended it to mean the same thing as "such." [5]

Under the plain language of the Douglas Amendment, Connecticut's and Massachusetts' authorizations of bank acquisitions by out-of-state bank holding companies from other States triggered the "authorization exemption" of the Douglas Amendment as to acquisitions by holding companies from any State.

B. The Legislative History of the Douglas Amendment Does Not Demonstrate a Congressional Intent To Authorize States To Enact Geographically Limited Waivers of Its Absolute Prohibition.

As a general rule, resorting to legislative history is inappropriate when the meaning of a statute is clear on its

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[5] *See Board of Governors* v. *Agnew*, 329 U.S. 444, 447-48 (1947) (giving effect to the distinction made by Congress between the words "primarily" and "principally").

face. *See, e.g., TVA* v. *Hill,* 437 U.S. 153, 184 n.29 (1978); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197-201 (1976); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945). This basic rule of statutory construction should preclude any consideration of legislative history here. But even if reference be made to the legislative history, it cannot be read to contradict the statutory language. Indeed, we believe it to be conceded by the Board and the court of appeals that in 1956 Congress simply did not consider the prospect of a discriminatory state waiver similar to the Connecticut and Massachusetts Interstate Acts.[6] *Compare Bank of New England Corporation,* 70 FED. RES. BULL. at 385 *with* 740 F.2d at 207; *see also Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975).

Twenty-seven years ago, Senator Douglas, the other proponents of his Amendment, and the Amendment's opponents recognized that no State had passed enabling legislation of any sort and believed none would do so. *Compare, e.g.,* 102 CONG. REC. S6860 (remarks of Sen. Douglas) (April 24, 1956) *with id.* (remarks of Sen. Bennett) *and with id.* at S6861 (remarks of Sen. Bricker); *see also Senate Comm. on Banking and Currency, Amendments to S. 2577, Transcript of Proceedings in Executive Session* 6, 19 (March 6, 1956). There was therefore no discussion as to the effect

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[6] While there is no legislative history supporting the view that Congress authorized the States to enact limited waivers of the Douglas Amendment's prohibition, such legislative history as exists does suggest a congressional assumption that any waiver of the Douglas Amendment's bar would be comprehensive, consistent with the plain language analysis of the statute presented herein. *See* 102 CONG. REC. S6859 (April 24, 1956) (remarks of Sen. Douglas) (purpose of amendment is to prevent bank holding company expansion across state lines "unless the States give *them* explicit permission to do so") (emphasis added).

under the Douglas Amendment of any state legislation authorizing entry by out-of-state holding companies on a discriminatory basis, regional or otherwise. *See Iowa Independent Bankers, supra,* 511 F.2d at 1296. The legislative history simply cannot be read as supporting a federal incorporation of a geographically limited state entry statute when the issue was not considered at all.

While there are a number of references in the legislative history of the BHC Act to protecting the rights of the States, none of this discussion was in the context of a limited waiver of the Douglas Amendment's prohibition. The discussion of States' rights occurred instead in connection with the nonpreemption provision of the BHC Act (Section 7), which was introduced in the original House version of the Act and is discussed below. *Compare* H.R. 2674, § 9 ("Reservation of Rights to the States"), 84th Cong., 1st Sess. (1955) *with* 12 U.S.C. § 1846; *see also* S. REP. NO. 1095, 84th Cong., 1st Sess. 22 (1955).[7]

C. A Comparison Between the Language of the McFadden Act and That of the Douglas Amendment Supports This Conclusion.

The Douglas Amendment was modeled on the McFadden Act. *See* 102 CONG. REC. S6860 (April 24, 1956) (remarks of Sen. Douglas); H.R. REP. No. 609, 84th Cong., 1st Sess. 3, 15 (1955). Accordingly, a comparison between the two provisions is an important aid in construing the Douglas Amendment. *NCNB Corporation,* 68 FED. RES. BULL. 54, 59 (1982).

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[7] There is, moreover, not the slightest indication in the legislative history that Congress intended to afford to States in the Douglas Amendment rights which were broader than the constitutional standard implicit in Section 7. Brief of the Federal Respondent in Opposition, November 6, 1984, at 6 (there was "no congressional discussion of the specific types of action that the States might or might not take under the Douglas Amendment").

Both the McFadden Act and the Douglas Amendment place restrictions on bank expansion and then generally authorize expansion if permitted by state law. But at this point the comparability ends and the contrast begins. The McFadden Act uses language that specifically makes all limitations of state law applicable to national bank expansion by branching. It provides that a national bank may establish and operate new branches within a State in which it is located

> "if *such establishment and operation* are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks.*"

12 U.S.C. § 36(c) (emphasis added).

Thus, under the McFadden Act, in order for a national bank to branch within the State in question, "*such* [branch] establishment and operation" must be authorized for state banks by the State's law. By using a word of limitation—"such"—Congress required that the specific type of transaction be authorized by state law.

Moreover, the McFadden Act eliminates any doubt as to the relevancy of state-law restrictions by explicitly subjecting national banks "to the restrictions as to location imposed by the law of the State on State banks." This formulation imposes on national banks—for branching purposes—all the limitations a State chooses to impose on state bank branching.[8]

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[8] As a result, both the potential and the criteria for intrastate branching by national banks vary widely from State to State. *Com-*

(footnote continued on following page)

In contrast, in the Douglas Amendment's authorization clause, Congress did not adopt parallel language incorporating directly or indirectly restrictions imposed by state law. Therefore, the Douglas Amendment enables States to authorize out-of-state bank holding companies in general to effect in-state acquisitions, but not selectively to authorize entry only by "such" out-of-state bank holding companies as they might prefer.

Congress had in the McFadden Act a ready model of how to adopt the full range of state law, and chose not to use it.[9] Instead, Congress gave the States the authority only to eliminate Congress's own prohibition against entry by out-of-state holding companies.

(footnote continued from preceding page)

pare, e.g., MASS. LAWS ch. 172, § 11 (permitting branching only within bank's home city or county) *with* MO. REV. STAT. ch. 362, 107-08 (limiting total number of branches which may be maintained or operated within a given county) *with* KAN. STAT. ch. 9-1111 (prohibiting branching altogether) *and with* N.J. STAT. 17:9A-19 (prohibiting branching by a bank with its home office in one city into a city in which another bank has its home office).

[9] In addition to the McFadden Act, Congress has expressly adopted state laws regulating banking in connection with the provision of trust services (12 U.S.C. § 92a (1984 Supp.)), the setting of interest rates (12 U.S.C. § 85 (1984 Supp.)), and the giving of security for the deposit of public funds (12 U.S.C. § 90 (1945 and 1984 Supp.)).

II.

The Douglas Amendment Cannot Be Read To Authorize State Discrimination Against Sister States.

The Board in this case did not address the analysis of the Douglas Amendment set forth above. Rather, it construed the statute by employing a peculiar circular analysis to find that the Amendment allowed limited waivers which discriminate against sister States: Beginning with the proposition that it regards state statutes as constitutional unless they are clearly and unequivocally unconstitutional, and recognizing that under *Lewis* prohibitions on entry by out-of-state holding companies cannot be justified under Section 7 of the BHC Act, 12 U.S.C. § 1843 (1982), the Board strained to find the necessary congressional consent in the Douglas Amendment itself. (A40-41).[10]

Thus, the Board adopted deference to state statutes as a canon for construction of federal statutory law, in essence holding that the BHC Act should be construed to validate otherwise unconstitutional state legislation unless another construction was "clearly and unequivocally" required. (A41). The court of appeals affirmed in a cursory opinion, according "substantial deference" to the Board and presenting little analysis of its own. (A29). The conclusion reached by the Board and the court of appeals, like the process by which it was reached, is patent error under this Court's decisions, and recognition of that error further demonstrates the validity of the construction of the Douglas Amendment here advanced.

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[10] "A" citations are to the Appendix to the Petition for a Writ of Certiorari.

In those "few unique federal statutes" which delegate to the States virtually plenary power over certain aspects of interstate commerce, Congress has used language which clearly and unmistakably accomplishes that purpose. *See International Shoe Co.* v. *Washington,* 326 U.S. 310, 315 (1945). Thus, in the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1976), Congress stated that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." In *Prudential Ins. Co.* v *Benjamin,* 328 U.S. 408, 430 (1946), this Court held that such language was sufficient to confer on the States ability to restrict the flow of interstate commerce they would not otherwise enjoy. *See also Western and Southern Life Ins. Co.* v. *State of Equalization,* 451 U.S. 648, 671 (1981) (approving legislation under the McCarran-Ferguson Act designed to induce uniformity of taxation amongst the States); *Whitfield* v. *Ohio,* 297 U.S. 431, 438 (1936) *(construing* Hawes-Cooper Act, 47 U.S.C. § 60 (1957)) (prisoner-made goods "shall upon arrival [in a State] . . . be subject to the operation and effect of the laws of such State to the same extent and in the same manner as though manufactured in such State");[11] *In re Rahrer,* 140 U.S. 545, 562 (1891) *(construing* Wilson Act, 27 U.S.C. § 121 (1984 Supp.)) (intoxicating liquids or liquors "shall upon arrival [in a State or Territory] be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory"). Even in these instances, however, Congress has not suggested that the

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[11] The Hawes-Cooper Act was repealed by Pub. L. 95-473, § 4(b), 92 Stat. 1466 (1978).

States are free to pick and choose those other States with which they will allow commerce to be conducted.

It follows that had Congress intended in the Douglas Amendment to authorize state legislation lifting the federal bar to interstate bank acquisitions on *any* limited basis (let alone a discriminatory, regional one), it would certainly have used specific, clear language to that effect. There is, of course, no such language in the BHC Act.[12] Indeed, as discussed in Point I, above, the language of the Douglas Amendment is to the contrary.

The truly remarkable claim made by respondents—that Congress has authorized the States to form trading blocs, exclusionary of other States—is wholly unsupported and flies in the face of two centuries of our history as a single Nation sharing a single economic destiny. Rival trading regions were rejected by the Framers, and if they are to be

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[12] There is one instance where Congress itself created an exception to the general prohibition of the Douglas Amendment. In the Garn-St. Germain Depository Institutions Act of 1982, Congress authorized the acquisition of failing commercial banks and thrift institutions by out-of-state depository institutions, 12 U.S.C. § 1823(f) (1982); 12 U.S.C. § 1730a(m) (1982), subject to observance of specified priorities, *e.g.*, 12 U.S.C. §§ 1823(f)(6)(B), (C).

While Congress accorded in-state offerors priority over out-of-state bidders and offerors from adjoining States priority over other out-of-state bidders, *id.*, it did not create any sort of banking regions and its expressly stated preference for geographic proximity did not discriminate against any State or group of States. Moreover, that preference, like the higher priority for in-state offerors, was made secondary to other considerations. *See id.; see generally Citicorp*, 70 FED. RES. BULL. 149 (1984).

In view of Congress's care not to discriminate among the States in crafting its *own* exception to the Douglas Amendment, it cannot possibly be thought to have empowered each State by implication to engage in such discrimination against other States when exercising the delegated authority to waive the Douglas Amendment's general prohibition.

reinstituted by the States it requires, *at the very least,* an express and unmistakable Act of Congress to that effect.[13]

Within the last few years alone this Court has held on four separate occasions that if Congress intends to delegate to the States its power to regulate interstate commerce, *even on a nondiscriminatory basis,* that intent must be "expressly stated" and "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke,* 104 S.Ct. 2237, 2242 (1984); *Sporhase* v. *Nebraska,* 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982); *Lewis* v. *BT Investment Managers, Inc., supra,* 447 U.S. at 49.[14] The Douglas Amendment lacks any such language and, *a fortiori,* the Amendment does not authorize discrimination by one State against

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[13] We note that legislation which would have sanctioned the result respondents advocate was introduced by Senator Garn in 1983 and passed the Senate, but did not pass the House. S. 2851, 98th Cong., 2d Sess. § 903(2) (1984); *see also* Press Release of April 6, 1983 (A190-91).

Were Congress ever to adopt such a measure, and were it to provide for or result in the exclusion of particular States from any region, two serious constitutional issues would be posed: (1) Can even Congress itself place a particular State in commercial isolation, or would that contravene the Original Understanding of equality among members of the Union? (2) If Congress has such power, may it delegate that power to the States severally, or may such a decision be made only at the national level? The position advocated by intervenor-respondents and adopted by the Board and the court of appeals necessarily assumes, without even mentioning these novel and difficult questions, that Congress has such power and that it may be delegated. This Court would have to agree in order to affirm on the grounds stated below.

[14] Indeed, the Court held just last Term that even the Twenty-first Amendment, which on its face grants each State plenary power over the "importation" of alcoholic beverages, was insufficient to validate state legislation otherwise in conflict with the Commerce Clause. *Bacchus Imports, Ltd.* v. *Dias,* 104 S. Ct. 3049, 3057-59 (1984).

another—a concept wholly anathema to the Union created in 1789.[15]

III.

Application of the Plain Meaning of the Douglas Amendment Is the Only Means of Sustaining the Interstate Acts and Approving the Transactions.

Neither of the Interstate Acts purports on the enacting State's own authority to prohibit entry by bank holding companies from any other State. Rather, each is drafted as a waiver of the Douglas Amendment's federal prohibition with an effort to limit the effect of that waiver to entry from particular sister States. Had the purported limitations instead been drafted as actual prohibitions on entry from all but the favored States they would be invalid under the Commerce Clause.

The Solicitor General conceded in his Brief in Opposition for the Federal Respondent, November 6, 1984, at 5:

> "In the absence of congressional authorization there seems little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause."

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[15] The principal weakness of the Confederation was its inability to regulate commerce in the face of parochial restrictions. THE FEDERALIST, Nos. 22 (Hamilton), 42 (Madison); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 14 (1824) (oral argument of Daniel Webster); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827) (Marshall, C.J.). Indeed, when it drafted the Commerce Clause the Constitutional Convention had before it a wealth of evidence of "rival, conflicting and angry regulations" passed by Connecticut, Maryland, New Jersey, New York, Pennsylvania and Virginia, which had the effect of fragmenting the Confederation into trading regions. *See* 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 547-48 (1911).

This Court held in *Lewis* v. *BT Investment Managers, Inc.*, *supra*, 447 U.S. at 49, that Section 7, the BHC Act's antipreemption provision, did not constitute congressional consent to otherwise unconstitutional state restrictions on interstate expansion by bank holding companies. The Court also stated with respect to the Douglas Amendment:

> "[I]t is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

Id. at 47 (1980) (emphasis in the opinion).

Accordingly, the Interstate Acts can be sustained and the Transactions approved only by applying the Douglas Amendment in accordance with its plain meaning—the consent given by the Interstate Acts to entry by "an out-of-State bank holding company" operates as a complete waiver of the federal prohibition as to entry from all States, and the Acts are therefore constitutional.[16]

IV.

Adoption of the Position Here Advanced Does Not Confront the States With an "All or Nothing" Choice Regarding Out-of-State Bank Holding Companies.

The principal reason advanced by the Board (6a) in declining to read the Douglas Amendment as it is plainly

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[16] *See also* footnote 13, at page 18, *supra*.

written was that the plain language of the Amendment, if given effect,

> "would transform the numerous state statutes that allow acquisition of banks by limited classes of out-of-state bank holding companies into unlimited-entry statutes."

The Board also suggested that accepting Bank of New York's position might somehow call into question the Board's prior approval of applications made in accordance with these statutes. (5a-6a). This second concern was entirely misplaced, since under Bank of New York's analysis no state statute waiving the Douglas Amendment's prohibition, or Board action pursuant to such a statute, would be at all questionable. The first concern is also, on analysis, mistaken.

Each of the various types of statutes mentioned by the Board is a simple waiver of the Douglas Amendment's federal prohibition, accompanied by certain regulations or prohibitions enacted as part of the State's own law. As this Court recognized in *Lewis*, Section 7 of the Act "reserve[s] to the States a general power to enact regulations applicable to bank holding companies," so long as that power is exercised "within the boundaries of the Commerce Clause" and is "not inconsistent with the Act." 447 U.S. at 48-49. Under the standard set forth in *Lewis*, state legislation affecting bank holding companies which is not inconsistent with federal law may be valid if it affects interstate and local holding companies equally, or if any "disparate burden" placed on interstate holding companies is only "incidental" and not excessive in relation to the local benefit secured. 447 U.S. at 43; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 131, 142 (1970).

One important category of state statutes restricting out-of-state holding companies, those prohibiting entry unless

the holding company's home State also allows entry from the State in question, are clearly constitutional under this standard.[17] Such statutes promote rather than restrain interstate commerce, and relief from them is available through a holding company's home-state legislature. Similar statutes have been consistently upheld by this Court. *See, e.g., Bode* v. *Barrett,* 344 U.S. 583, 586 (1953) (abatement of highway use taxes); *New York* v. *O'Neill,* 359 U.S. 1, 11 (1959) (attendance of out-of-state witnesses); *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U.S. 452, 469-70 (1978) (equitable taxation of multistate businesses). Likewise, the Iowa statute at issue in *Iowa Independent Bankers, supra,*[18] was a simple "grandfather" provision, putting all bank holding companies then doing business in the State of Iowa on an equal basis. Again, similar statutes have been held valid by this Court for years. *See, e.g., United States* v. *Maryland Savings Share Ins. Corp.,* 400 U.S. 4 (1970) (per curiam); *Watson* v. *Maryland,* 218 U.S. 173 (1910).

Statutes which regulate the in-state activities of out-of-state bank holding companies, such as the Delaware and South Dakota laws, DEL. CODE ANN. tit. 5, §§ 801 *et seq.* (Supp. 1984) (authorizing acquisition by out-of-state bank holding companies of Delaware state banks, and then imposing restrictions, *inter alia,* as to manner of operation, so as to encourage location of wholesale banking operations in Delaware); S.D. CODIFIED LAWS ANN. § 51-16-41 (Supp. 1984) (same statutory structure, but designed to attract bank credit card operations), may also pass muster

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[17] *See* N.Y. BANKING LAW § 142-b (Supp. 1983); *cf.* R.I. GEN. LAWS § 19-30-2 (Supp. 1984) (full reciprocity after two-year period of regional limitation).

[18] IOWA CODE § 524.1805 (Supp. 1984).

under Section 7 and the Commerce Clause, if the burden they impose is not disproportionate to the legitimate (*i.e.*, nonprotectionist) local benefits they achieve. *See Lewis* v. *BT Investment Managers, Inc., supra,* 447 U.S. at 43.[19]

While the validity of the various state regulations and prohibitions to which the Board had reference is not here in issue, and is, in any event, irrelevant to the interpretation of the Douglas Amendment, many of them are well within the States' reserved powers under Section 7. However they may be viewed, affirmance of the court of appeals based on the analysis set forth herein confirms, rather than questions, both the validity of the waiver provisions of these statutes and of the Board's past approvals of transactions initiated in accordance with those provisions.

Conclusion

If the Douglas Amendment is properly read, the Interstate Acts withstand constitutional scrutiny because they do not result in discrimination and thus do not raise constitutional issues. As discussed in Points I and II, under the plain language of the Douglas Amendment, the Inter-

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[19] The Board itself remarked, in approving a bank holding company's application to establish a "credit card" bank in Nevada, that "such statutes do not raise the serious constitutional questions under the Commerce Clause that are posed when states discriminate against other states" through "regional banking compacts." *Citicorp,* 71 FED. RES. BULL. 101, 103 (1985).

The Board's desire to hold such restrictions valid under the Douglas Amendment, without reference to Section 7 and the Commerce Clause, is nonetheless puzzling in light of the Board's strongly expressed concern that legislation of this sort by certain States—which seek to attract major money center bank holding companies for limited purposes, largely by offering lower tax rates—is prejudicial to the public interest in "a stable and sound banking system locally and nationwide" and will, if not checked, produce "a serious impairment of banking standards." *Id.*

state Acts' attempts at discriminatory waivers are ineffective as a matter of federal statutory law; any waiver of the Amendment's prohibition on acquisition of local banks by out-of-state bank holding companies is a waiver as to entry from any other State.

By reading the Douglas Amendment in accordance with its plain meaning, this Court can prevent a conflict with the basic principles of the Constitution and at the same time avoid the unnecessary resolution of any constitutional issues. Under these circumstances, there can be no reason to reject the precise language which Congress used. Accordingly, the judgment of the court of appeals should be affirmed for the reasons, and based on the analysis, stated herein.

Respectfully submitted,

JOHN L. WARDEN
Counsel for The Bank of New York Company, Inc., Amicus Curiae

125 Broad Street,
New York, New York 10004.
(212) 558-3610

H. RODGIN COHEN
MICHAEL STRAUS

SULLIVAN & CROMWELL

JAMES F. MATTHEWS
DAVID T. HALVORSON

THE BANK OF NEW YORK COMPANY, INC.

Of Counsel

February 21, 1985

ADDENDUM

Order of the Board of Governors of the Federal Reserve System Denying the Application of The Bank of New York Company, Inc. To Acquire the Subsidiary Banks of Northeast Bancorp, Inc. (May 15, 1984)

Order Denying Acquisition of a Bank Holding Company

Bank of New York Company, Inc., New York, New York ("BNY"), a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for the Board's approval under section 3(a) of the Act (12 U.S.C. § 1842 (a)) to acquire 95.3 percent of the voting shares of Northeast Bancorp, Inc., New Haven, Connecticut ("Northeast"), also a bank holding company under the Act. BNY would thereby acquire control of Northeast's subsidiary banks, Union Trust Company, Stamford, Connecticut, and Security Bank and Trust, Waterbury, Connecticut. BNY has also applied under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 C.F.R. § 225.23(a)(2)) to acquire Northeast's nonbank subsidiaries, NBI Mortgage Investment Corporation and Union Financial Services Corporation, both of New Haven, Connecticut.

Notice of the applications, affording opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act. (49 *Federal Register* 9618, 10580 (1984)). The time for filing comments has expired, and the Board has received comments from Bank of New England Corporation, Boston, Massachusetts, CBT Corporation, Hartford, Connecticut, and the Independent Bankers Association of America. In addition, the State of Connecticut has recommended denial of the

application, thus triggering the requirement in section 3(b) of the Act for a hearing on the application. The State of Connecticut has waived its rights to an immediate hearing in order to permit the Board to evaluate whether this proposed interstate acquisition would be permissible under the Douglas Amendment, before considering the substantive merits of the application.[1] BNY has agreed to this procedure.

Connecticut has enacted a regional interstate banking statute that, by its terms, allows bank holding companies located only in those New England states that have passed interstate banking laws similar to that enacted by Connecticut to acquire banks located in Connecticut.[2] BNY argues that, in enacting this statute authorizing the acquisition of Connecticut banks by other New England bank

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[1] The Douglas Amendment provides that:

> [N]o application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest. 12 U.S.C. § 1842(d).

[2] 1983 Conn. Acts. 411 (Reg. Sess.). In view of the Board's findings in this Order regarding the Douglas Amendment, the Board has not considered other provisions of the Connecticut statute that may prohibit this acquisition.

holding companies, Connecticut has eliminated the federal bar of the Douglas Amendment to acquisition of Connecticut banks by all other out-of-state bank holding companies. BNY asserts that, under the literal terms of the Douglas Amendment, once a state allows *any* out-of-state bank holding company to purchase a bank within the state, the state has authorized the acquisition of banks in the state by *all* bank holding companies, wherever located. Under BNY's reading of the Douglas Amendment, even those New York holding companies that the Connecticut statute was designed to exclude, such as BNY, would be eligible to acquire a bank in Connecticut.

The State of Connecticut and the other protestants argue that the Douglas Amendment authorizes the states to limit acquisitions of banks within a state to out-of-state bank holding companies located in specified states and that, in any event, BNY's interpretation is inconsistent with the meaning and commonly accepted understanding of the Douglas Amendment, its legislative history, and prior Board and judicial construction of its terms.

The Board has considered the arguments advanced by BNY in support of its position. BNY bases its position almost entirely on textual analysis of the Douglas Amendment's provision that grants the states authority to remove the federal bar on interstate acquisitions. The Douglas Amendment prohibits an out-of-state bank holding company from acquiring a bank located in another state "unless the acquisition of such shares or assets of a State bank by *an* out-of-state bank holding company is specifically authorized . . ." (emphasis supplied). BNY asserts that Congress, in using the indefinite article "an," rather than a restrictive modifier like "such," intended that a state statute that authorized acquisition of a bank in the state by "any" or "a

single" out-of-state bank holding company would remove the Douglas Amendment's prohibition on interstate acquisitions by bank holding companies of banks in that state.

The Board is not convinced that the use of the article "an" should be accorded such decisive weight as suggested by BNY, particularly where such a reading would be contrary to the commonly accepted and understood interpretation of the Douglas Amendment, the legislative history and purposes of the Amendment, and Board and judicial practice in applying the Amendment. The Board believes that the article "an" must be read in the context of the entire state authorization provision in the Douglas Amendment. Based on the terms and structure of the Act and its purposes, the Board concludes that the phrase "unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized . . ." contained in the Douglas Amendment must be read, as the courts[3] and the Board have previously read the phrase, to refer to the specific acquisition or type of acquisition for which Board approval is sought under the Act.

In this regard, the language of the Douglas Amendment, in requiring that interstate bank acquisitions by out-of-state bank holding companies be authorized by a state's statute laws "by language to that effect and not merely by implication," reflects a Congressional concern that the states make a deliberate and express decision with respect to interstate banking. This clause of the Douglas Amendment is inconsistent with a reading, such as that proposed by BNY, that would undermine a state's policy determinations by causing the states inadvertently to allow unlimited interstate bank acquisitions.

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[3] *See Iowa Independent Bankers Association* v. *Board of Governors of the Federal Reserve System*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

Addendum

In effect, BNY's argument would compel the states to adopt an "all or nothing" approach in permitting the entry of out-of-state bank holding companies.[4] The Board has recently considered this issue and concluded: "Nothing in the history of the Douglas Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry."[5] Similarly, the United States Court of Appeals for the District of Columbia Circuit, the only court to examine this issue, has stated that it was "obvious" that "the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy" and that adoption of an interpretation similar to that urged by BNY in this case "would rob the states of this power." *Iowa Independent Bankers, supra,* 511 F.2d at 1297.[6] The court also noted that "nothing in the language of [the Douglas Amendment] points to [the] result" that "the states can only decide whether to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely." *Id.* at 1296.

The states and the Board have consistently construed the Douglas Amendment to authorize the states to limit or to restrict entry by out-of-state bank holding companies.

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[4] *Bank of New England Corporation,* 70 FEDERAL RESERVE BULLETIN 374 (1984).

[5] *Id.* at 386.

[6] In *Conference of State Bank Supervisors* v. *Conover,* 715 F.2d 604, 615 (D.C. Cir. 1983), *cert. denied,* 52 U.S.L.W. 3720 (U.S. April 2, 1984), the court reaffirmed its reading of the authority granted to the states under the Douglas Amendment.

Addendum

The Board has approved a number of applications under statutes that admit only certain bank holding companies or that admit bank holding companies only under certain circumstances and that exclude all other bank holding companies. For example, the Board has considered the Douglas Amendment in acting upon applications by "grandfathered" out-of-state bank holding companies, by holding companies seeking to acquire limited purpose "credit card" banks in other states, by holding companies seeking to acquire failing out-of-state banks and, most recently, by holding companies seeking to acquire out-of-state banks pursuant to reciprocal or regional interstate banking statutes.[7] With respect to regional interstate banking statutes, the Board considered whether the discrimination inherent in such statutes against bank holding companies located in certain states is permissible under the Douglas Amendment and the United States Constitution. The Board concluded that, while the issue is not free from doubt, there is no clear and unequivocal basis to find these statutes to be inconsistent with the Constitution.

BNY's interpretation of the Douglas Amendment would transform the numerous state statutes that allow acquisition of banks by limited classes of out-of-state bank holding companies into unlimited-entry statutes. BNY's argument, if accepted, would cause full interstate banking in those states, a result contrary to the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interstate banking to the ac-

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[7] *See, e.g., Northwest Bancorporation,* 38 *Federal Register* 21530 (1973); *Citicorp,* 67 FEDERAL RESERVE BULLETIN 181 (1981); *BankAmerica Corp.,* 69 FEDERAL RESERVE BULLETIN 568 (1983); *Key Banks, Inc.,* 70 FEDERAL RESERVE BULLETIN 57 (1984); *Bank of New England Corporation,* 70 FEDERAL RESERVE BULLETIN 374 (1984).

quisition by out-of-state bank holding companies of banks located within the borders of a state. Such a sweeping reinterpretation of the Douglas Amendment should appropriately be accomplished only by legislative action.

For the foregoing reasons, the Board concludes that the Douglas Amendment prohibits the Board from approving BNY's proposed acquisition of Northeast, and BNY's application to acquire Northeast pursuant to section 3(a) of the Act is hereby denied.[8]

The Board's denial of this application is based upon its reading of the text and purposes of the Douglas Amendment, and nothing in this Order is intended to modify the views previously expressed by the Board concerning interstate banking on a regional, reciprocal basis.[9] As the Board noted in its *Bank of New England Corporation* Order, interstate banking is a highly complex issue that involves the balancing of a number of different considerations. However, if the New England regional approach to interstate banking is emulated in other parts of the country, there is a potential danger that the result could be to divide the country into a number of banking regions. The Board believes that the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action.

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[8] The Board notes that BNY is not prohibited from acquiring Northeast's nonbanking subsidiaries, but it denies the application of BNY to acquire these subsidiaries pursuant to section 4(c)(8) of the Act since there is no indication that BNY intended to have the Board decide the proposed acquisition of Northeast's nonbanking subsidiaries on a separate basis.

[9] *Bank of New England Corporation, supra,* 70 FEDERAL RESERVE BULLETIN at 379.

Addendum

By order of the Board of Governors, effective May 15, 1984.

Voting for this action: Chairman Volcker and Governors Martin, Partee, Teeters, Rice, and Gramley. Absent and not voting: Governor Wallich.

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

MOTION FILED
FEB 21 1985

No. 84-363

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,
against
THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,
and
BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION,
THE COMMONWEALTH OF MASSACHUSETTS,
THE STATE OF CONNECTICUT AND
BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NEW YORK STATE BANKERS ASSOCIATION

JOHN LEFEROVICH, JR.
General Counsel
NEW YORK STATE BANKERS ASSOCIATION
485 Lexington Avenue
New York, New York 10017
(212) 949-1164
Counsel for Amicus Curiae
New York State Bankers Assocation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE NEW YORK STATE BANKERS ASSOCIATION

The New York State Bankers Association respectfully requests permission to file the attached brief *amicus curiae* in support of petitioners.

STATEMENT OF INTEREST

The New York State Bankers Association (the "Association") is the largest trade association for the commer-

cial banking industry in the State of New York. The Association represents 152 banking organizations comprising ninety-four percent of the commercial banks in the state. The membership of the Association includes banks of every size located in all parts of the state, from a few large banks such as petitioner Citicorp to many small, local banks. Ninety percent of the members of the Association are smaller than any of the respondent bank holding companies.

The Connecticut and Massachusetts statutes at issue in this case injure the members of the Association by permitting bank holding companies in each of those states to acquire banks in the other state, while preventing New York bank holding companies—even New York bank holding companies which have banking subsidiaries in other New England states—from acquiring banks in Connecticut and Massachusetts. They also restrict the ability of bank holding companies in Connecticut and Massachusetts to engage in interstate commerce by acquiring New York banks. These discriminatory statutes injure not only large banks located in New York City, but also smaller New York banks located throughout the state, particularly those near Connecticut and Massachusetts.

Moreover, these statutes are part of a rapid, alarming trend toward regional banking systems. None of the regional systems being developed permits acquisitions by New York bank holding companies. Bank holding companies located in states which participate in such a regional banking system are similarly prohibited from acquiring New York banks. This regional balkanization of banking poses a serious threat to all of the Association's members.

ISSUES TO BE PRESENTED

The attached brief *amicus curiae* has two purposes. First, this brief describes how the Connecticut and Massachusetts statutes at issue in this case injure all New

York banks and bank holding companies. Petitioner Citicorp, the only New York petitioner, is not in a position to describe this pervasive, state-wide injury from its own experience. Second, this brief presents an analysis of the constitutional questions raised by the statutes which differs from that which petitioners presented in their Petition for *Certiorari* and will presumably present in their briefs on the merits.

STATEMENT OF CONSENT OR OBJECTION

Counsel for the Association have contacted counsel for all parties of record to seek their consent to the filing by the Association of this brief *amicus curiae*. Counsel for all parties other than the State of Connecticut indicated that they would be willing to give such consent. Because of Connecticut's objection, the Association was unable to obtain unanimous consent.

WHEREFORE, for the reasons set forth above, the Association requests that the Court grant this motion to file the attached brief *amicus curiae* in support of petitioners.

Respectfully submitted,

JOHN LEFEROVICH, JR.
General Counsel
NEW YORK STATE BANKERS ASSOCIATION
485 Lexington Avenue
New York, New York 10017
(212) 949-1164
Counsel for Amicus Curiae
New York State Bankers Assocation

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BRIEF AMICUS CURIAE OF THE NEW YORK STATE BANKERS ASSOCIATION

INTEREST OF AMICUS CURIAE

The New York State Bankers Association (the "Association") is the largest trade association for the commercial banking industry in the State of New York. Its membership includes 152 banking organizations of every size and geographic location in New York, comprising ninety-four percent of the commercial banks in the state. Over

ninety percent of the Association's members have assets below $5 billion. Some are centered in New York City, while others are centered in small cities and towns throughout the state.

This case involves the constitutionality of statutes enacted by the states of Connecticut [1] and Massachusetts [2] authorizing out-of-state bank holding companies to acquire banks in those state only if they are headquartered in specific "New England" states. The dispute arose when respondents Bank of Boston Corporation and Bank of New England Corporation, both Massachusetts bank holding companies, sought to acquire bank holding companies located in Connecticut, and when respondent Hartford National Corporation, a Connecticut bank holding company, sought to acquire a Massachusetts bank holding company. Applications for approval of the proposed acquisitions were submitted to the Federal Reserve Board ("the Board"), which has authority over the transactions pursuant to the Bank Holding Company Act ("BHCA"), 12 U.S.C.A. §§ 1841-1850 (West 1980 & Supp. 1984). Although the Board expressed doubt as to the constitutional validity of the Connecticut and Massachusetts statutes, it approved the applications because it was unable to conclude that the state statutes were "clear[ly] and unequivocal[ly]" unconstitutional. (Pet. App. A41, A74-A75). The orders of the Board approving the acquisitions were affirmed by the Second Circuit.[3] This Court granted *certiorari* on January 7, 1985.

The statutes under review are of great importance to the Association's members. Many of the Association's members consider all or part of Connecticut and Massa-

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[1] 1983 Conn. Act 83-411 (Reg. Sess.) (Appendix to Petition for Writ of *Certiorari* ("Pet. App.") A97-A100).

[2] Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (Pet. App. A101-A102).

[3] 740 F.2d 203 (2d Cir. 1984) (Pet. App. A21-A33).

chusetts (as well as other New England states) to be within their service areas. A number of member banking organizations maintain non-bank subsidiaries in Connecticut, Massachusetts and other New England states, which compete with New England banking organizations with respect to certain financial services. Other Association members have already obtained banks in Maine, which freely allows entry by banks from other states. Furthermore, many members are geographically located close to Connecticut or Massachusetts, with which New York shares extensive borders. In many cases, these banks would be natural partners for nearby Connecticut or Massachusetts banks. Thus, the members of the Association are vitally interested in having the same opportunity as other out-of-state competitors to engage in banking in the New England area.

The interests of these members in equal competition are adversely affected by the regionally discriminatory Connecticut and Massachusetts statutes here at issue. Those statutes are part of a purposeful attempt to create an exclusive New England banking region by allowing bank holding companies from specified New England states freely to acquire banks within the region, while prohibiting New York bank holding companies and banks from acquiring, or being acquired by, New England banks and bank holding companies (the "New England Compact").[4]

If this discriminatory scheme were allowed to stand, all New York banks, whether large or small, would be pro-

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[4] The history of the two acts makes clear that the intent of the legislation is to exclude outside banks, especially the money center banks headquartered in New York, from being able to compete with New England banks within the region. *See, e.g.*, N.Y. Times, Apr. 3, 1983, § 3, at 4, col. 3 (statement of Massachusetts State Senator Brennan) (Pet. App. A189-A190); Massachusetts House Committee on Banks and Banking Research Staff Summary (Nov. 9, 1982) (Pet. App. A150-A152); Conn. Senate Debate (Mar. 26, 1983) (statement of Connecticut State Senator Sullivan) (Pet. App. A159).

hibited in each state in the region from competing on equal terms with banks headquartered anywhere in New England.[5] For example, New York banking institutions that currently provide financial services in Massachusetts and Connecticut through non-bank subsidiaries would have to compete on a disadvantaged basis with large banking organizations located in other New England states that could provide customers with full banking services in addition to the financial services that the New York banking institutions could offer. Similarly, New York banks located near the border of Connecticut or Massachusetts would be unable to combine with banks located in neighboring communities in those states in order to better serve local needs, although those Connecticut or Massachusetts banks could combine with banks located far away in other New England states.

The Connecticut and Massachusetts statutes would also restrain banks in the New England region from engaging in interstate commerce outside of the region by acquiring New York banks, thereby denying the benefits which such acquisitions could offer to New York banks and their communities. The definition in the Connecticut Act of "New England bank holding company" requires, *inter alia*, that all of the company's subsidiaries have their principal places of business in New England. The statutory penalty applicable to a New England bank holding company that acquires a New York bank or bank holding company is immediate divestiture of all direct or indirect ownership interests in any Connecticut bank or bank holding company. The Massachusetts statute is similar, albeit somewhat less restrictive. Under that act, a New England bank holding company would be penalized for acquiring a

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[5] The Connecticut and Massachusetts statutes even prohibit indirect competition in those states by a New York bank. Under each of those statutes, a bank holding company located in Maine, for example, would be disqualified from the benefits of the statutes if it were directly or indirectly owned or controlled by a New York bank or bank holding company.

bank outside the region if such acquisition resulted in a shifting of its principal place of business outside of the region.

The adverse effect which the New England Compact would have upon New York banking institutions threatens significant injury to the economy of the State of New York. In 1983, financial services accounted for the employment of 686,400 persons in New York, with 241,200 persons being employed directly in banks. As the State of New York noted at pages 2-3 of its *Amicus Curiae* Brief in Support of the Petition for *Certiorari*, "financial services—and particularly banking—are to New York as corn is to Kansas, coal to West Virginia, oil and cattle to Texas."

Moreover, the effects of the New England Compact cannot be viewed in isolation. Other regional banking centers are presently being created, and the impetus for such regional centers will undoubtedly increase if this Court upholds the Connecticut and Massachusetts statutes. The Board has itself remarked on the growing trend toward regionalization of banking:

> The regional interstate banking system developing in New England raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. The Georgia legislature has already passed a regional interstate banking statute, and there are proposals for regional banking systems in the Southeast (Florida and Georgia and a combination of other states as far north as Virginia), the Northwest (Washington, Oregon and Idaho), the Mid-Atlantic (New Jersey, Pennsylvania and several other states as far south as Virginia) and the Mid-West (several different regional groupings under discussion). Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New Eng-

> land interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation.

(Pet. App. A37-A38) (footnote omitted). As described at page 11 of the Petition for Writ of *Certiorari*, this movement toward sectionalism has progressed even further since the above statement was made by the Board.

The trend toward regionalization will have especially harsh effects on banking institutions located in the State of New York, which is wholly excluded from each of the regional banking centers now under consideration. The proposed Mid-Atlantic region would include several states, such as New Jersey and Pennsylvania, that are contiguous to New York and within the natural service area of many New York banks. The formation of such a Mid-Atlantic region, combined with the New England Compact, would result in New York being excluded from the interstate competition permitted in all regions adjoining the state. In essence, New York is being made the target of concerted banking boycotts designed to isolate New York banking institutions from the rest of the banking community.

SUMMARY OF ARGUMENT

The Connecticut and Massachusetts statutes at issue are in plain violation of the Commerce Clause, unless they are authorized by the Douglas Amendment to the BHCA. The Douglas Amendment establishes a federal principle of state-by-state banking, but authorizes each state to permit entry by out-of-state bank holding companies. There is no indication in the language of the Douglas Amendment or its legislative history that this provision was intended to renounce federal interest in interstate banking. Instead, the BHCA and the prior opinions of this Court indicate that any state statute which permits out-of-state banking organizations to acquire banks within the state must do so within the bound-

aries of the Commerce Clause. Certainly, neither the Douglas Amendment nor its legislative history meets this Court's requirement of an unmistakably clear congressional authorization to the contrary. The legitimate state interest in local control of banking institutions, which is recognized by the Douglas Amendment, cannot justify discriminatory statutes establishing special commercial relations among certain states to the exclusion of others.

The Connecticut and Massachusetts statutes also run afoul of the Compact Clause. The statutes were enacted as part of a regional agreement that adversely affects the federal structure by aggrandizing the power of states within the region, to the detriment of excluded states. The agreement therefore requires the assent of Congress, which has not been granted.

ARGUMENT

I. THE CONNECTICUT AND MASSACHUSETTS STATUTES VIOLATE THE COMMERCE CLAUSE

As the court below and the Board recognized, and as respondents effectively concede,[6] the Connecticut and Massachusetts statutes plainly violate the Commerce Clause of the United States Constitution[7] unless they have been authorized by act of Congress. Respondents claim to find the necessary congressional authorization in section 3(d) of the BHCA, 12 U.S.C.A. § 1842(d) (West Supp. 1984), commonly referred to as the Douglas Amendment. In essence, the Douglas Amendment precludes the Board from approving the acquisition of a bank by any out-of-state bank holding company, unless a

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[6] None of the respondents has asserted that the statutes could be upheld absent the approval of Congress. Instead, they argue that such discriminatory statutes are authorized by federal statute.

[7] U.S. Const. art. I, § 8, cl. 3.

statute in the state where the bank is located authorizes such an acquisition. It thus recognizes the legitimacy of each state's interest in local control of banking institutions in that state. However, the Douglas Amendment does not renounce federal interest in interstate banking, or otherwise abrogate the Commerce Clause as it applies to state statutes permitting interstate banking acquisitions. Rather, the state's legitimate interest in local control of banking institutions must be considered in determining whether a particular statute is unreasonable under the Commerce Clause. The Connecticut and Massachusetts statutes are unreasonable in that they discriminate on the basis of state-of-origin and are not closely tailored to legitimate state interests.

A. The Douglas Amendment Was Not Intended To Abrogate The Commerce Clause As It Applies To State Statutes Permitting Interstate Banking Acquisitions

Under the BHCA, the approval of the Board is required before a bank holding company can acquire any bank. Section 3(d) of the BHCA, the Douglas Amendment, states that the Board may not approve the acquisition by a bank holding company of a bank located in another state, unless the statutory law of the state in which the bank is located permits such acquisition.[8] As the Board has noted, the Douglas Amendment does not on its face authorize the states to restrict interstate commerce.[9] Instead, as this Court explained in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980):

> The language of the statute establishes a general federal prohibition on the acquisition or expansion

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[8] The Board may also approve the interstate acquisition of a failing bank pursuant to 12 U.S.C.A. § 1823(f) (West Supp. 1984). *See infra* pp. 10-11.

[9] (Pet. App. A65) ("the Douglas Amendment does not appear *on its face* to authorize discrimination") (emphasis in original).

> of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited.

Id. at 47 (emphasis in original). Indeed, the Court stated in *Lewis* that "it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities." *Id.*[10]

Thus, the language of the Douglas Amendment does no more than empower the states to make it possible for the Board to approve interstate banking acquisitions. While it recognizes the legitimate state interest in local control of banking institutions, it does not authorize the states to regulate interstate commerce in ways that are unreasonable and therefore violate the Commerce Clause.[11] This interpretation of section 3(d) is confirmed by this Court's explanation in *Lewis* of section 7 of the BHCA, 12 U.S.C. § 1846 (1982).[12] The Court recognized that,

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[10] *Lewis* dealt with the expansion of non-bank subsidiaries of bank holding companies across state lines, while the statutes here at issue deal with the acquisition of bank subsidiaries by bank holding companies; properly construed, they do in fact attempt to regulate the activities of bank holding companies. Under the Connecticut statute, for example, a New England bank holding company that owns a Connecticut bank may not acquire a New York State bank without divesting its ownership interest in the Connecticut bank.

[11] In contrast, when Congress has intended to abrogate the Commerce Clause, it has done so clearly and explicitly, as in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982). *See, e.g., Western & S. Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 653-55 (1981).

[12] Section 7 provides:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

"[i]n contrast to § 3(d), § 7 of the Act does reserve to the States a general power to enact regulations applicable to bank holding companies." 447 U.S. at 48. Nevertheless, the Court found that section 7 was intended to permit only "state legislation that operates within the boundaries marked by the Commerce Clause." *Id.* at 49. Since section 7 preserves state regulation of bank holding companies even if more restrictive than federal law, but only if it is consistent with the Commerce Clause, the more limited, permissive authority granted to the states by section 3(d) can hardly be construed as congressional authorization to ignore the Commerce Clause.[13] *Cf. Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959-60 (1982) (congressional deference to state water laws and interstate water compacts does not remove such laws from scrutiny under the Commerce Clause).

There is no merit to respondents' claim that Congress has renounced all interest in interstate banking. In fact, the Douglas Amendment is itself an expression of federal interest. It adopts the federal principle[14] that interstate acquisitions are forbidden unless permitted by individual states. More recently, in the Garn-St Germain Depository Institutions Act of 1982, Congress demonstrated the continuing federal interest in interstate acquisitions by providing authority to federal banking regulators to arrange acquisitions of failing or failed banks by out-of-state bank holding companies.[15] In authorizing such interstate acquisitions, Congress stated no preference for acquisitions by bank holding companies in contiguous or regional

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[13] The limited nature of section 3(d) is further supported by the context of the statute in which it appears. The focus of section 3 is on the powers, responsibilities and limitations of the Federal Reserve Board, not the states. It is section 7 which was intended to address the issue of state authority. Moreover, section 7 was enacted at the same time as section 3(d), and the two should therefore be construed *in pari materia*.

[14] *See Lewis*, 447 U.S. at 47.

[15] *See* 12 U.S.C.A. § 1823(f) (West Supp. 1984).

areas over acquisitions by bank holding companies located elsewhere.

The very limited legislative history of the Douglas Amendment also fails to support respondents' claims that Congress intended to grant the states *carte blanche* to form sectional alliances and create multi-state banking regions. Nothing in this legislative history suggests that Congress intended to empower a state to exercise its authority to permit interstate expansion by discriminating among out-of-state banks based on their state of origin, much less to band together with other states in an exclusive banking region that boycotts other states. Indeed, as the Board recognized, the legislative history demonstrates "no discussion of the power of the states to discriminate among potential out-of-state entrants." (Pet. App. A66) (footnote omitted).

Moreover, at the time when Congress adopted the Douglas Amendment, it had before it proposals to create regional banking areas.[16] None of these proposals was adopted. There is no reason to believe that Congress, without saying a word, would have passed a statute with the intent to allow the states to organize just the types of regional centers that Congress had decided not to create.[17]

Respondents primarily rest their claim of unlimited discretion on the single statement by Senator Douglas

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[16] *See Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 before a Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. 140 (1955) (Pet. App. A120-A121); H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-3 (1955) (Pet. App. A132-A133).

[17] This is particularly true in light of the dangers that such regional enclaves pose to individual states that might be excluded—New York's precise fate under the Connecticut and Massachusetts statutes. If Congress had intended there to be regional banking centers it would have set them up itself in a reasonable manner; it would not have left individual states to the whim and mercy of other states.

that his amendment would "permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them." 102 Cong. Rec. 6858 (1956). This Court has frequently stated that "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982) (citation omitted). In any event, there is nothing in this statement which indicates that the Commerce Clause would not apply if and when states acted to permit expansion. A more reasonable reading is that Senator Douglas simply meant that out-of-state bank holding companies would only be able to acquire banks in states which permitted interstate acquisitions, subject to any reasonable regulations that such states might impose consistent with the Commerce Clause. *Cf. Sporhase*, 458 U.S. at 958-60; *Lewis*, 447 U.S. at 49 (federal deference applies only to valid state laws).

Finally, respondents' position lacks common sense. Congress, which has consistently demonstrated in its antitrust laws strong concern over combinations in restraint of trade, would not have silently sanctioned a law under which a group of states could collectively and intentionally boycott another state.

B. There Is Certainly No Unmistakably Clear Congressional Authorization Of These State Statutes

In *South-Central Timber Development, Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984), this Court invalidated under the Commerce Clause an Alaska requirement restricting the export of certain timber taken from state lands. In holding that the state restriction was not authorized by a parallel federal policy regarding timber from federal lands in Alaska, the Court reaffirmed the principle that state regulations which would otherwise violate the Commerce Clause may be upheld only if Con-

gress has affirmatively expressed its intent to authorize such state regulation in a way that is "unmistakably clear." *Id.* at 2242. *See also Sporhase*, 458 U.S. at 960 (noting that congressional consent to state regulation of interstate commerce has been found only where such "intent and policy" had been "expressly stated"); *New England Power Co.*, 455 U.S. at 343. Such an unmistakably clear expression of intent must demonstrate that "Congress affirmatively contemplated otherwise invalid state legislation." *Wunnicke*, 104 S. Ct. at 2242.

The requirement of unmistakable affirmative authorization was stated by the Court in *Wunnicke* to be necessary to effectuate the policies underlying the Commerce Clause. 104 S. Ct. at 2242. As the Court explained:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. . . . On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be affected by restraints on commerce.

Id. at 2243 (footnote omitted). Accordingly, the Court held that it is not sufficient authorization that the state action be found "in harmony" with federal policy. *Id.* at 2242.[18] Here, the discriminatory statutes, which attempt to set up a regional banking center, are not even

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[18] In expanding upon this holding, the Court explained that "[t]he fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." *Id.* at 2243.

in harmony with the federal policy of individual state banking units.

Indeed, the Connecticut and Massachusetts statutes exemplify the grave dangers to the federal system that the requirement of unmistakable affirmative authorization by Congress was intended to prevent. Whether (and, if so, how) the nation should be divided into banking regions is a delicate and important task; it should not be found to have been delegated to the several states without the most explicit affirmative statement of congressional intent. Every available indication of congressional intent suggests that Congress expected the states to operate within the boundaries of the Commerce Clause in exercising their authority under section 3(d) of the BHCA. In any event, there is certainly no "unmistakably clear" affirmative authorization to the contrary.[19]

C. The State Interest in Local Control Of Banking Recognized By The Douglas Amendment Cannot Justify These Statutes

In most cases involving parochial state regulations that protect local commercial interests by discriminating against out-of-state competitors, this Court has applied a rule of *per se* invalidity. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Here, however, the Douglas Amendment forbids entry by out-of-state bank holding companies into any individual state absent permission from that state. As a result, a balancing test may be the more appropriate standard for determining whether the Connecticut and Massachusetts statutes unreasonably affect interstate commerce and are thus outside the scope of state legislative action which Congress intended to sanction by the Douglas Amendment.

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[19] Indeed, the Board itself concluded that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court." (Pet. App. A65).

The basic principles that apply under the balancing test were set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted). *See Lewis*, 447 U.S. at 36-37 (quoting *Pike* test). In addition, consideration must be given to the legitimate interest, recognized by the Douglas Amendment, in retention by each state of local control over banking institutions within the state. *Cf. Sporhase*, 458 U.S. at 954-58 (strong state interest in preservation of scarce water supplies a factor to be considered in Commerce Clause analysis). Even when this interest is weighed in the balance, however, the Connecticut and Massachusetts statutes clearly cannot survive constitutional scrutiny.

First, the two statutes are not evenhanded. Although the Douglas Amendment allows a state to continue to refuse entry to all out-of-state banks, these statutes discriminate among the various states by permitting or prohibiting interstate acquisitions based solely on whether the out-of-state banking institution is principally located in a favored or excluded state.[20] The principle that states should not discriminate by selecting among states is sufficiently important that it has been embodied in the

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[20] In contrast, a non-discriminatory reciprocal statute, such as that enacted by New York, is evenhanded in that any state can share in the benefits simply by enacting reciprocal legislation.

Privileges and Immunities Clause of the United States Constitution.[21] Moreover, the Connecticut and Massachusetts statutes are part of a concerted effort among a group of states to create a regional banking area and to boycott New York banks.[22] It was the destructive effects of just such sectionalism and "economic balkanization" which the Commerce Clause was intended to prevent. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984); *Wunnicke*, 104 S. Ct. at 2242; *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976);[23] *The Federalist Papers*, No. 7, at 62-63 (A. Hamilton), No. 42, at 267-68 (J. Madison) (Rossiter ed. 1961).

It is not sufficient to say that Congress has created economic balkanization by sanctioning a dual banking system and adopting the Douglas Amendment in the first place. A congressional policy judgment in favor of prohibiting interstate banking but allowing states to permit it is not the same as a policy judgment allowing any number of states, acting in combination, to "regionalize"

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[21] U.S. Const. art. IV, § 2, cl. 1. Although the Privileges and Immunities Clause does not apply to corporations, *see, e.g., Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981), the Massachusetts and Connecticut statutes, whose definitions of "bank holding company" are coterminous with that of the BHCA, would, under traditional regulatory principles, apply to individual citizens acting in concert pursuant to private contractual arrangements. *See, e.g.*, Board Staff Opinion, Oct. 11, 1979, *reprinted in* 1 Fed. Reserve Regulatory Serv. § 4-425.

[22] The special dangers posed by combinations and agreements in restraint of trade have been well recognized in our antitrust laws, and this Court has noted that antitrust concepts may be useful in applying Commerce Clause principles. *Wunnicke*, 104 S. Ct. at 2246.

[23] As the Court noted in *Cottrell*, discriminatory legislation can "open 'the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.'" *Id.* (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935)).

banking without benefit of any congressional approval—much less "unmistakably clear" approval—of the scheme.

Second, there is no "close fit" between these state statutes and the asserted legitimate state interest in preserving local control of banking institutions.[24] *See, e.g., Sporhase*, 458 U.S. at 957; *Hughes v. Oklahoma*, 441 U.S. at 336; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). For example, the Connecticut statute would allow a bank located in another New England state, perhaps hundreds of miles away, to acquire a Connecticut bank, but would not allow a Connecticut bank located on the New York border to merge with a nearby New York bank serving the same community.[25] And even if it were assumed that Connecticut and Massachusetts each have a legitimate interest in protecting local banks against acquisition by large out-of-state bank holding companies, the statutes at issue are patently overbroad. Over ninety percent of the Association's members are smaller in size than any of the respondent bank holding companies. Yet these smaller banks are excluded from acquiring banks in either Connecticut or Massachusetts, while larger banks in either of those states may freely acquire a bank in the other state.[26]

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[24] The Board concluded in this respect that "the disparate treatment of non-New England bank holding companies does not appear to be justified 'as an incidental burden necessitated by legitimate local concerns.'" (Pet. App. A60) (quoting *Lewis*, 447 U.S. at 42).

[25] Even if it were assumed that Connecticut and Massachusetts had a legitimate interest in encouraging acquisitions by bank holding companies located in states with a demonstrable interest in the welfare and growth of the New England region, the statutes at issue are overbroad in their exclusion of even New England bank holding companies from further expansion if they are controlled by non-New England entities.

[26] It is also doubtful that any of the four respondent bank holding companies, the stock of each of which is nationally traded, can really be considered a locally controlled institution.

The Connecticut and Massachusetts state statutes also discriminate among other states by limiting expansion of New England banking organizations only to selected states. *See supra* pp. 4-5. The statute thus restricts the opportunity of New England bank holding companies to engage in interstate acquisitions, except within New England, and restricts the ability of New York banks to be acquired by bank holding companies located in New England.

The whole focus of the Connecticut and Massachusetts statutes is not on domestic concerns, but rather on external affairs—that is, with establishing special commercial relations with certain states to the exclusion of others.[27] These statutes threaten to bring about precisely the type of sectional economic warfare that the Commerce Clause was intended to prevent. As such, they are clearly unconstitutional.

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[27] The Commerce Clause reasoning applied in other areas where particularly strong state interests are at stake confirms the invalidity of these statutes. For example, in cases involving state regulation of alcoholic beverages, where the states are given plenary control pursuant to the Twenty-First Amendment, this Court has harmonized the state's special interest with the policies of the Commerce Clause. *See, e.g., Bacchus Imports*, 104 S. Ct. at 3058; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Similarly, in *Sporhase*, the Court gave consideration to the state's special interest in preserving its scarce water resources and to Congress' deference to state water policies, but nevertheless found that the statute violated the Commerce Clause. 458 U.S. at 954-58. As the Court stated in *Midcal Aluminum*, the key to Commerce Clause analysis in such cases is to make a "pragmatic effort to harmonize state and federal powers." 445 U.S. at 109. Under such an analysis, state actions are unlawful when they go beyond what is necessary to protect important state interests and infringe on the policies of the Commerce Clause. As demonstrated above, and as concluded by the Board, *see supra* note 24, the Connecticut and Massachusetts statutes at issue go well beyond the state's legitimate interest in local control of banking institutions and unduly burden interstate commerce.

II. THE CONNECTICUT AND MASSACHUSETTS STATUTES VIOLATE THE COMPACT CLAUSE

The Compact Clause of the United States Constitution,[28] requires states to obtain congressional approval before entering into compacts or agreements. Under this Court's interpretation, *see, e.g., United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), three issues must be considered in analyzing joint state action under the Compact Clause: (1) whether the joint action constitutes an agreement or compact; (2) whether it is the type of agreement or compact that requires the consent of Congress; and (3) whether Congress has consented. The Connecticut and Massachusetts statutes fail this three-part test.

The history surrounding the Connecticut and Massachusetts statutes leaves no doubt that they were enacted pursuant to a regional understanding that comes within the purview of the Compact Clause. (For a description of the joint efforts made to create a regional banking center, see the Petition for Writ of *Certiorari* at 4-6.) In *United States Steel Corp. v. Multistate Tax Commission*, this Court emphasized that the Compact Clause reaches informal as well as formal agreements, including agreements effected through reciprocal legislation.[29] 434 U.S. at 470-71.

The New England Compact is also of the type that requires the assent of Congress. As this Court stated in *United States Steel*, "[t]he relevant inquiry must be one of impact on our federal structure." 452 U.S. at 471. The New England Compact threatens the federal structure by disturbing relations among the states and promoting sec-

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[28] U.S. Const. art. I, § 10, cl. 3.

[29] This of course would not affect a unilaterally enacted, individual state statute such as that of New York, which was not part of any interstate agreement and merely promises reciprocity to any other state willing to do the same.

tionalism. The effect of the Compact is to allow its members to aggrandize their power at the expense of New York and other excluded states in a way that the Compact members could not achieve without the Compact.[30] Relations between the states are part of the federal structure to be protected by the Compact Clause. *See, e.g., Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838). Here, unlike *United States Steel*, the Compact will "redound to the benefit of [a] particular group of States [and] to the harm of others." 452 U.S. at 477. Indeed, that is its precise intent. This purpose and effect is plainly an affront to our federal structure.

There is no congressional authorization for the New England Compact.[31] As discussed above, the Douglas Amendment was not intended to authorize discriminatory state statutes, much less the formation of alliances among states to create exclusive regional banking enclaves.

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[30] It is no response to state, as did the court below, that Congress can remove such an impediment. If this were relevant, the Compact Clause would be wholly superfluous, since Congress can always negate any state infringement on its sovereignty. The purpose of the Compact Clause was to require congressional assent *before* any such state action could occur.

[31] Indeed, although the issue has been raised in Congress in recent years, supporters of measures that would explicitly sanction exclusive regional banking compacts have been unable to secure their passage.

CONCLUSION

For the reasons set forth above, this Court should reverse the court below and declare the Connecticut and Massachusetts statutes unconstitutional.

Respectfully submitted,

JOHN LEFEROVICH, JR.
General Counsel
NEW YORK STATE BANKERS ASSOCIATION
485 Lexington Avenue
New York, New York 10017
(212) 949-1164
Counsel for Amicus Curiae
New York State Bankers Assocation

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No. 84-363

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NORTHEAST BANCORP., INC., UNION TRUST COMPANY and CITICORP, PETITIONERS

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF FOR U.S. SENATORS Alphonse M. D'Amato Daniel P. Moynihan and U.S. REPRESENTATIVES Hamilton Fish, Robert Garcia, John J. LaFalce, Stanley L. Lundine, Charles E. Schumer, and George C. Wortley as AMICI CURIAE IN SUPPORT OF PETITIONERS

J. Robert Lunney, Esq.
641 Lexington Avenue
New York, New York 10022
(212) 355-0800

(Counsel of Record)

February 21, 1985

44pp

ALPHONSE M. D'AMATO, U.S. Senator, New York

DANIEL P. MOYNIHAN, U.S. Senator, New York

HAMILTON FISH, JR., Member of Congress
21st District, New York

ROBERT GARCIA, Member of Congress
18th District, New York

JOHN J. LaFALCE, Member of Congress
32nd District, New York

STANLEY L. LUNDINE, Member of Congress
34th District, New York

CHARLES E. SCHUMER, Member of Congress
10th District, New York

GEORGE C. WORTLEY, Member of Congress
27th District, New York

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of this Court, U.S. SENATORS Alphonse M. D'Amato Daniel P. Moynihan and U.S. REPRESENTATIVES Hamilton Fish, Robert Garcia, John J. LaFalce, Stanley L. Lundine, Charles E. Schumer, and George C. Wortley respectfully seek leave to file the at-

tached brief as amici curiae in support of petitioners. The consent of counsel for petitioners has been granted; the consent of counsel for respondents has been withheld. Copies of the correspondence pertaining to consent have been filed with the Clerk of this Court.

All amici are Members of Congress from the State of New York. Amici share a deep concern over the court of appeals' misconstruction of the Douglas Amendment, 12 U.S. 1842(d), a misconstruction which has opened the door to discriminatory state legislation that effectively balkanizes the banking industry along regional lines and which permits groups of states to form confederations that boycott commerce emanating from disfavored states. In this case, the State of New York bears the brunt of such discriminatory legislation. Amici have a strong interest in urging this Court to reverse an erron-

eous construction of a federal statute which exposes their own state to a pernicious form of economic discrimination.

As members of Congress, amici have an additional interest in this case. The decisions of this Court construing the Commerce Clause and the Compact Clause establish that reciprocal, regionally-discriminatory state legislation, injurious to sister states, may not be sustained unless clearly approved by Congress. In this case, Congress has never approved the discriminatory state laws at issue, and certainly has never given its sanction to multi-state compacts which boycott disfavored jurisdictions. The purposes of the Commerce and Compact Clauses and the prerogatives of Congress would be gravely undermined if congressional approval of discriminatory state laws could be "inferred" by courts from general language such as that contained in the Douglas Amendment.

The attached amicus brief should provide a useful supplement to the presentation of petitioners and afford the Court additional information concerning the practical realities surrounding congressional review and approval of legislation that discriminates against interstate commerce.

Respectfully submitted,

J. Robert Lunney, Esq.
641 Lexington Avenue
New York, New York 10022
(212) 355-0800

February 21, 1985 (Counsel of Record)

QUESTIONS PRESENTED

This brief amicus curiae will address the following questions:

1. Has Congress, in the Douglas Amendment, authorized confederations of states to establish interstate banking regions through multi-state compacts that permit full service banking within the region by bank holding companies located there, but boycott bank holding companies located in states outside the region?

2. Absent clear authorization by Congress, does such balkanization of interstate banking through regional compacts violate the Commerce Clause and the Compact Clause of the Constituion?

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INTEREST OF AMICI CURIAE

As explained in the foregoing motion, amici have a direct and substantial interest

in the outcome of this case. Their home state, the State of New York, is the target of the discriminatory boycott challenged in this litigation. In addition, the court of appeals' implication of congressional approval in this case has effectively prevented legislators from New York from taking action in Congress to prevent a form of discrimination that is harmful to their home state and to the economic welfare of the Nation. Amici, as Members of Congress, have a deep interest in reaffirming the need for review and approval by the national legislature of state statutes that discriminate against commerce deriving from disfavored parts of the United States.

STATEMENT

1. At issue in this case is the constitutionality of reciprocal, regionally-restrictive banking laws enacted by Massachusetts in 1982 (Mass. Gen. Laws Ann. ch.

167A, Sec. 2 (West 1971 & Supp. 1984)) and by Connecticut in 1983 (1983 Conn. Act 83-411). Those laws, adopted as part of a multi-state compact in the New England area (see Pet. App. A51-A52), permit bank holding companies within New England to provide full-service banking anywhere within that region, but deny that right to bank holding companies located elsewhere. In particular, financial institutions in the State of New York -- many of which are located only a few miles from New England -- are barred from entering the designated multi-state region.

The Connecticut and Massachusetts statutes have a discriminatory purpose as well as a discriminatory effect. The principal sponsor of the Massachusetts statute, Senator John A. Brennan, Jr., readily acknowledged that the purpose of the regional statutes was to exclude the money center banks in New York (Pet. App. A189):

> "I just didn't think it would be good for the state if the big money center banks came in here."

The legislative history shows that the Massachusetts statute was intended (id. at A150):

> "to establish in the General Laws the necessary authority for a regional, New England banking system * * * [and] to ensure that only New England based financial institutions can avail themselves of this authority."

When Connecticut enacted a parallel statute a few months later, Connecticut legislators specifically referred to "the large New York banks" and the "fear that they would come into Connecticut" (Pet. App. A159-A160). They intended to give "our banks in Connecticut" an opportunity to "merge and consolidate and purchase some of the New England banks" without competition from New York banking institutions (id. at A157-A160).

2. While the advocates of regionally restrictive banking legislation succeeded in securing enactment of laws in New England

designed to "set up a real New England system" (Pet. App. A162-A168, A189), they never have persuaded Congress to accept their proposals. Although bills have been introduced in Congress that would authorize regionally discriminatory banking legislation, those bills have failed of enactment (id. at A190-A191, A205-A207). Specifically, during its most recent session, Congress declined to enact S. 2851, 98th Cong., 2d Sess. (1984), which would have empowered states to enter into discriminatory regional compacts. Chairman Peter W. Rodino explained to Speaker Thomas P. O'Neill, Jr., that such legislation raises "Constitutional questions requiring careful consideration" and that congressional endorsement should not be granted without "careful scrutiny." Letter of September 14, 1984, appended to reply brief in support of petition for certiorari, (A1-A3).

3. Despite this lack of congressional approval, the proponents of the bank acquisitions at issue in this case contended before the Board of Governors that implicit authorization for regionally discriminatory state laws might be found in the general language of the Douglas Amendment, 12 U.S.C. 1842(d), which forbids the Board to approve the acquisition of a local bank by an out-of-state bank holding company "unless the acquisition of such * * * a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located."

In reviewing this argument, the Board found (Pet. App. A65) that "the Douglas Amendment does not appear <u>on its face</u> to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England States

* * *, but against all other states." The Board also acknowledged that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court" (id.). Turning to the legislative history, the Board likewise found "no discussion of the power to discriminate among out-of-state entrants" (id. at A66). The Board further acknowledged that, absent congressional approval, the discriminatory state laws at issue in this case would violate well-established constitutional principles articulated by this Court (id. at A58).

Notwithstanding the absence of any statutory language or legislative history establishing a congressional intent to permit discriminatory state laws, the Board nonetheless declined to invalidate those state laws. The Board felt incapable of invalidating them

absent "clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution" (Pet. App. A40). The Board sustained the statutes in reliance on the general provisions of the Douglas Amendment which, it believed, manifested Congress' deference to the states (id. at A41, A50-A52, A55-A71). The Board referred to the Douglas Amendment as a general "renunciation" of federal interest in regulating interstate bank acquisitions which implicitly permitted the challenged statutes enacted by Connecticut and Massachusetts (id. at A52).

4. The court of appeals affirmed the Board's ruling and expressly sustained the constitutionality of the discriminatory Massachusetts and Connecticut statutes. The court did not question the discriminatory impact of the state laws, or deny that they were enacted as part of an exclusionary

multi-state compact which boycotted the State of New York. Deferring to the Board, which previously had deferred to the courts (Pet. App. A67, A195), the court of appeals concluded that the discriminatory laws could be sustained under the Douglas Amendment, which the court believed to be a relinquishment of all federal interest in the subject matter (id. at A29). The court disposed of petitioners' Commerce Clause challenge on the theory that the discriminatory laws had been implicitly "authorized" by Congress (id. at A31). And it found the challenged laws to be consistent with the Compact Clause on the theory that the compact in this case did not "increase the political power of the New England States or encroach upon or interfere with the just supremacy of the United States" (id. at A32).

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

The court of appeals has improperly relied upon general language in the Douglas Amendment, 12 U.S.C. 1842(d), as an implicit authorization of state legislation that discriminates against interstate commerce emanating from disfavored states such as the State of New York. This approach to statutory construction violates a fundamental principle of constitutional law declared by this Court in its Commerce Clause decisions. A congressional purpose to permit discrimination against interstate commerce may be found by federal courts only if that purpose is "express" (Sporhase v. Nebraska, 458 U.S. 941, 960 (1982)), or "unmistakably clear" (South-Central Timber Development, Inc. v. Wunnicke, ___ U.S. ___, 104 S.Ct. 2237, 2242 (1984)). This constitutional requirement guarantees

that before a state is subjected to discriminatory legislation by sister states, the national legislature will have focused on the issue, debated the wisdom of imposing discrimination, and approved the result. It effectively secures the right of representatives of the state which is subjected to discrimination to participate in the debate and ultimate decision, and thereby represent the interests of their own constituents. "A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision." Wunnicke, supra, 104 S. Ct. at 2243.

In this case, as the Board expressly found, the language of the Douglas Amendment and its legislative history are devoid of any evidence that Congress meant to permit discrimination among states in allowing interstate bank acquisitions. Thus, the discrimi-

nation inflicted on New York in this case is the work of the New England States alone -- and not the national legislature. Contrary to established Commerce Clause principles, the "unrepresented interests" of the State of New York have been injured by discriminatory laws enacted by other states without the supervision or approval of Congress. Wunnicke, supra, 104 S.Ct. at 2243.

II.

The decision of the court of appeals also clashes with settled principles declared by this Court under the Compact Clause. The Compact Clause requires prior congressional approval if a multi-state compact, such as the New England Compact, "'project[s] a new presence onto the federal system [or] alter[s] any state's basic sphere of authority.'" U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452, 469 n. 21 (1978). "This provi-

sion is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others. And the right and duty to protect these interests is vested in the general government." Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1854).

The multi-state compact at issue in this case plainly projects a new presence onto the federal system, and directly and substantially prejudices the economic interests of excluded states such as the State of New York. The compact poses a serious danger to the welfare of the federal system: it threatens to substitute antagonism and retaliation for the harmonious union of co-equal states contemplated by the Founding Fathers.

Congress has never approved multi-state compacts of the kind at issue in this case.

General deference to state legislation in the Douglas Amendment in 1956 does not constitute congressional consent to regionally discriminatory compacts fashioned 25 years later in a manner never envisioned. In view of the overriding importance of the issue to national economic policy, and in view of Congress' unwillingness to endorse regionally discriminatory state laws in its recent sessions, the New England compact cannot withstand scrutiny under the Compact Clause.

ARGUMENT

I. THE MASSACHUSETTS AND CONNECTICUT REGIONAL BANKING STATUTES DISCRIMINATE AGAINST INTERSTATE COMMERCE WITHOUT CONGRESSIONAL APPROVAL AND THEY THEREFORE ARE INVALID UNDER THE COMMERCE CLAUSE.

The Board correctly pointed out in this case (Pet. App. A55) that "[a]bsent congressional authorization of [the regionally restrictive state laws] in the Douglas Amend-

ment, it appears that [they] would be inconsistent with the standards for state action under the Commerce Clause as established by the Supreme Court." The Solicitor General has agreed with that analysis: "In the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause." Brief in Opposition at 5. Thus, the dispositive issue under the Commerce Clause is whether Congress has clearly authorized discriminatory state legislation of the kind at issue here.

Proper analysis of this question is of enormous practical importance to the relationship between the States in our Union, and to the relationship between Congress and the federal judiciary. If federal courts may "imply" congressional approval of discriminatory multi-state arrangments from the general

language of federal statutes aimed at different objectives, then the common market guaranteed by the Framers of the Constitution under the Commerce Clause will be exposed to hazards beyond the power of Congress adequately to control. This would constitute a substantial threat not only to the welfare of states subject to discrimination, but also to the citizens of all states who benefit from the vital national economy protected by the Commerce Clause.

This Court repeatedly has expressed the principle in its Commerce Clause decisions that economic protectionism and regional preferences are forbidden unless specifically reviewed and approved by Congress in the exercise of its plenary power over interstate commerce. Congress must have an opportunity to carefully consider and analyze the policy issues raised when regional discrimination is proposed. In the present case, the genera-

lized language of the Douglas Amendment -- which merely empowers individual states "to permit expansion of banking across state lines where it otherwise would be federally prohibited" (Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 47 (1980)) -- cannot reasonably be viewed as expressing advance approval by Congress of the serious form of discrimination here at issue. The language of the statute does not refer to discrimination against disfavored states or multi-state boycotts; the legislative history contains not a word of discussion on this subject; and no purpose of the statute would be served by construing it as a grant of power to states to partition the Nation into preferred and boycotted regions.

If the language of the Douglas Amendment were construed to approve such discrimination sub silentio, the consequence would be that congressmen, whose responsibility it is to carefully consider the economic implications

of such discrimination, would be stripped of any meaningful opportunity to exercise that responsibility. Congressmen lacking any notice that proposed legislation would countenance discrimination otherwise violative of the Commerce Clause would not be able to serve their intended function as protectors of the Nation's common market, and representatives of disfavored jurisdictions, such as the State of New York, would not be able to protest and debate proposed discriminatory legislation.

This Court's decisions construing the Commerce Clause leave no doubt that congressional "authorization" cannot be implied from general language such as that contained in the Douglas Amendment. The Douglas Amendment merely empowers individual states to lift the ban on interstate bank acquisitions that otherwise would exist: the Board is authorized to approve an interstate acquisition

only when ". . . the acquisition * * * is specifically authorized by the statute laws of the State in which such bank is located * * *." 12 U.S.C. 1842(d). While this language defers to state law on the issue whether the ban on interstate acquisitions should be lifted, it in nc manner countenances discrimination among states or the creation of categories of preferred and boycotted jurisdictions.

That the general language of the Douglas Amendment does not support an inference of congressional authorization is evident from this Court's decision in Sporhase v. Nebraska, 458 U.S. 941, 958-60 (1982). In that case, the proponents of discriminatory state laws sought to justify them under the Commerce Clause based on general language in federal legislation deferring to state laws and providing that "the Secretary of the Interior,

in carrying out the provisions of this Act, shall proceed in conformity with such laws." They argued that this deference to and reliance upon "state law" in the federal administrative scheme constituted consent to discriminatory criteria incorporated within those state laws. This Court flatly rejected that contention.

In words that apply directly here, this Court held that congressional approval of discriminatory state laws must be clear and express and that general deference to state laws does not imply approval of state laws that otherwise would violate the Commerce Clause (id. at 959-60):

> "Although the [federal] statutes * * * demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the valid state law to which Congress

> has deferred. Neither the fact that Congress has not chosen to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause was 'expressly stated.'"

This Court also has explained that the requirement of unambiguous congressional approval of discriminatory state laws is an essential element in our constitutional system of federal government. As the Court pointed out in South-Central Timber Development, Inc. v. Wunnicke, ___ U.S. ___, 104 S. Ct. 2237, 2242-43 (1984), congressional authorization "must be unmistakably clear" if discriminatory state legislation is to be immune from the traditional strictures of the Commerce Clause.

The Court added that the "unmistakable" intent requirement assures that Congress -- the protector of all of the States -- has actually focused on the policy issues implicit in proposed discriminatory statutes (id. at 2243):

> "[W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."

These considerations apply directly here, and they compel the conclusion that the court of appeals erred in inferring congressional authorization to discriminate from the general language of the Douglas Amendment. In this case, there is no "assurance" that Congress

has made a "collective decision" to approve discrimination against boycotted states. Quite to the contrary, the language and legislative history of the Douglas Amendment are utterly barren of any indication that Congress focused upon and consented to such discrimination. Thus, the discriminatory boycott has gone into effect with review and approval only by the New England states themselves -- and New York's "unrepresented interests" have obtained no protection whatsoever from the national legislature.

This Court should adhere to the requirement of "unmistakable clarity" in Commerce Clause cases, and should continue to place the burden of demonstrating congressional consent upon the proponents of discriminatory state laws. In the absence of such a requirement, there can be no assurance that Congress will have focused upon and approved discriminatory

arrangements of vital concern to all States in the Union.

Application of the foregoing principles clearly establishes the error in the decision of the court of appeals. The Board correctly found that the language and history of the Douglas Amendment provide no evidence that Congress actually considered and approved discrimination by confederations of states against interstate commerce stemming from other states. In these circumstances, the reciprocal, regionally-restrictive statutes enacted by Connecticut and Massachusetts are invalid under the Commerce Clause.*/

*/ In addition to the absence of explicit congressional consent to these discriminatory state statutes, it is evident that the state statutes clash with the policies of the Douglas Amendment. The Douglas Amendment treats all states alike: it permits each state to preserve local control over banks within its borders, or to lift the ban on interstate acquisitions. The New England

(Footnote continued on next page.)

II. THE MASSACHUSETTS AND CONNECTICUT BANKING STATUTES ARE COMPONENTS OF A MULTI-STATE COMPACT WHICH INJURES SISTER STATES WITHOUT CONGRESSIONAL APPROVAL AND THEY THEREFORE ARE INVALID UNDER THE COMPACT CLAUSE.

The harmfulness of the Connecticut and Massachusetts statutes at issue in this case is increased greatly by the fact that they do not stand alone. They are part of a multi-state compact expressly designed by New England legislators to increase the economic

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(Footnote continued from previous page.)

statutes, by contrast, divide the nation into preferred and boycotted states.

Moreover, in a case such as this, it is totally unavailing to claim that state laws survive scrutiny under the Commerce Clause because they are generally consistent with the policies of the Douglas Amendment. As this Court explained in Wunnicke, "[t]he fact that the state policy in this case appears to be consistent with federal policy -- or even that state policy furthers the goals we might believe that Congress had in mind -- is an insufficient indicium of Congressional intent." 104 S.Ct. at 2243.

strength of institutions in their own geographical region at the direct expense of institutions in boycotted states, such as the State of New York. As explained in the petition for certiorari (pages 9-15), regionally-restrictive compacts are now emerging throughout the United States, all of which exclude the same disfavored "money center" states. The Solicitor General also has referred to this balkanization process in his brief in opposition, (pages 12-13).

The Board in this case correctly concluded that these reciprocal, regionally restrictive state statutes, adopted within a few months of each other as part of a concerted campaign to establish a New England banking system, are components of a multi-state compact. As the Board explained (Pet. App. A52), such laws may "be considered to be part of an implied compact or agreement that has never been approved or authorized by

Congress * * *." See also U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452, 470-71 (1978), holding that the Compact Clause reaches "agreements effected through reciprocal legislation," including the "formal as well as the informal."

In these circumstances, the court of appeals had no basis for concluding that the New England Compact should escape congressional supervision. The terms of the Compact Clause of the Constitution are unambiguous (Art. I, § 10, cl. 3): "No State shall, without the consent of Congress, * * * enter into any Agreement or Compact with another State * * *." While it is true that compacts of negligible significance to the welfare of the federal Union may be consummated without congressional approval (Multistate Tax Commission, supra, 434 U.S. at 469), this plainly is not such a situation. As this Court

explained in the Multistate Tax Commission case, "[t]he relevant inquiry must be one of impact on our federal structure." Id. at 471.

While the majority and dissenting opinions of this Court in the Multistate Tax Commission case disagreed about the proper application of Compact Clause principles to the facts of that particular case, they did not disagree about the fundamental principles themselves. In particular, all of the Justices agreed that a multi-state compact would require congressional approval if it disturbed relations among sister states in the federal Union. The majority explained that the Compact Clause requires prior approval if the compact leads "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." Id. at 468. The majority further explained that a compact may "neither

project a new presence onto the federal system nor alter any State's basic sphere or authority." Id. at 469 n. 21. Accordingly, the majority carefully considered the question whether the multi-state compact at issue in that case would "redound to the benefit of any particular group of States or to the harm of others." Id. at 477.

The dissenting opinion in the Multistate Tax Commission case also emphasized that a compact that impairs the interests of sister states is forbidden unless explicitly approved by Congress. Justice White pointed out that the majority "appears to recognize that allegations of harmful impact on other States is a cognizable challenge to a compact." Id. at 495. He explained (id. at 495-96):

> "There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority, nor is that surprising in view of the Federal Govern-

> ment's pre-eminent purpose to protect the rights of one State against another. If the effect of a compact were to put non-compact States at a serious disadvantage, the federal interest would thereby be affected as well."

Justice White also described the essential protective role of Congress in reviewing multi-state compacts of concern to excluded states (id. at 496):

> "As the constitutional arbiter of political differences between the States, the Congress is the proper body to evaluate the extent of harm being imposed on non-compact States, and to impose ameliorative restrictions as might be necessary. * * * The Compact Clause is an important, intended safeguard within our constitutional structure. It is functionally a conciliatory rather than a prohibitive clause. All it requires is that Congress review interstate agreements that are capable of affecting federal or other States' rights."

This Court has declared these fundamental principles from the earliest years of our federal Union. See, e.g., Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1854):

> "By the 10th section of the 1st article of the Constitution, no State can enter into any agreement or compact with another State, without the consent of Congress. * * * This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others. And the right and the duty to protect these interests is vested in the general government."

Accord, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725-26 (1838) (explaining that, "in giving to Congress the power of dissenting to such compacts," the Constitution intended "to guard against the derangement of * * * federal relations with the other States of the Union").

Congress' power of "dissenting" to the effectuation of a compact serves a vital purpose in a case such as this. As the State of New York has explained in its briefs amicus curiae in this Court, the New England Compact

threatens the economic welfare of that State. The compact aggrandizes the political and economic advantages that are withheld from a rival jurisdiction. The compact deliberately imposes an economic handicap on financial institutions in the State of New York -- large and small -- in order to give financial institutions in favored states a head start. No compact could be more antagonistic to the sovereign rights of the State of New York, more contrary to the concept of a common market among co-equal states, or more likely to provoke reprisal and retaliation. And it is for the welfare of the entire federal Union that compacts such as this be submitted to Congress for prior review and approval.

To regard the general language of the hastily-enacted Douglas Amendment as a "renunciation" of Congress' overriding interest in preserving a harmonious union among the

states is entirely misguided. Indeed, it would have been the height of irresponsibility for Congress to "relinquish" its responsibilities through the general language of this amendment, which received almost no debate or discussion before enactment. As Chairman Rodino explained to Speaker O'Neill in his September 14, 1984 letter, appended to petitioners' reply brief in support of certiorari, "[w]hile the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences." Chairman Rodino also pointed out that such scrutiny is essential to achieve one of the most important objectives of the Constitution -- "to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions." He also warned that such actions by coalitions of states

would "invite retaliation by States in excluded regions of the country." Id. at A2-A3.

The New England Compact threatens precisely these injuries to the economic welfare of the Nation. It accordingly is essential that the compact be submitted for review and approval by the national legislature. Congress has not yet granted that review and approval, and nothing in the language or history of the Douglas Amendment suggests that it may be dispensed with here.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

J. Robert Lunney, Esq.
641 Lexington Avenue
New York, New York 10022
(212) 355-0800

(Counsel of Record)

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Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

ROBERT HERMANN
Solicitor General

R. SCOTT GREATHEAD
First Assistant Attorney General

JUDITH T. KRAMER
HOWARD L. ZWICKEL
Assistant Attorneys General

DERRICK CEPHAS
Deputy Superintendent of
Banks and Counsel

MICHAEL SCHUSSLER
Assistant to the Superintendent
of Counsel

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amicus Curiae
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5745

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Supreme Court of the United States

October Term, 1984

No. 84-363

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The State of New York has a vital interest in protecting its citizens as well as its financial services industry from the regional protectionist banking provisions enacted by the Commonwealth of Massachusetts* and the State of Con-

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* Mass. Gen. Laws Ann. Ch. 167 A § 2 (West 1971 & Supp. 1984) (A101-102). (Numbers in parentheses refer to Petitioners' Appendix to the Petition for Certiorari.)

necticut* (collectively, the "New England Compact"). The challenged provisions prohibit bank holding companies which maintain their principal place of business in any state outside New England, including New York, from acquiring a bank in Massachusetts or Connecticut.

The proponents of the New England Compact have all but admitted that the primary purpose of their legislation is to exclude the large New York banks from participating in the banking business in New England. State Senator John A. Brennan, Jr., author of the Massachusetts statute, conceded that he was opposed to outside banks, particularly those located in "the big money center," acquiring New England banks. (A189). Similarly, Connecticut State Senator Sullivan urged the adoption of Connecticut's banking statute to prohibit "many of the large New York banks" from coming into Connecticut to "get our deposits" and to enable New England banks to "compete with the big money centers in New York and get stronger and stronger." (A159-160).

State Senator Sullivan's characterization of New York as the "big money center" is, in large part, correct. New York is the financial center of the United States. The financial services industry—comprised of banking, insurance, securities and related institutions—is one of New York's most important industries, employing more than one half million people. Indeed, financial services—and particularly banking—are to New York what corn is to Kansas, coal is to West Virginia and oil and cattle are to Texas.

The statutes at issue in this case apply to all New York banks even though New York's banking industry include approximately two hundred small or medium sized commercial

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* 1983 Conn. Act 83-411 (A97-A99).

banks. In fact, only eight of New York's banks are equal in size or larger than the largest bank in Massachusetts and only twelve are larger than the largest bank in Connecticut.* Moreover, almost all of the banks in New York are the same size or smaller than the average banks located in Massachusetts and Connecticut. Thus, two small banks located a few miles apart in rural areas and serving the same general population—one in upstate New York and the other in western Massachusetts—would not be permitted to merge. Similarly, two small or medium sized banks serving suburban communities—one headquartered in Fairfield County, Connecticut and the other headquartered in neighboring Westchester County, New York—would be prevented from combining. It is clear that, even in the absence of the New England Compact, the likelihood that any of the small or medium sized New York banks will take control over or centralize the New England banking system is very slight.

At the same time, the New England Compact encourages large banks in Massachusetts or Connecticut to gain greater financial control in the region. Under the New England Compact, a very large bank located in Boston would be permitted to acquire a small, local bank located in rural northwestern Connecticut, although the banks have neither geography nor economic interests in common. Similarly, the largest bank in Connecticut could merge with the largest bank in Massachusetts. And contrary to the stated purpose of the New England Compact, it is conceivable that the intervenor respondent Bank of New England will consolidate its already large holding in New England.

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* This information was derived from the "Consolidated Reports of Condition and Income" dated September 30, 1984 filed with the appropriate federal bank regulatory agency.

The New England Compact excludes all New York banks —large and small, upstate or downstate—from participating in the banking business in New England. This blanket prohibition harms New York banking institutions by depriving them of access to the New England banking market and harms the People of New York by denying them the improved services and lower costs that could result from the increased competition generated by interstate bank acquisitions. The State of New York has a vital interest in seeking to overturn protectionist regional statutes. Such laws will inevitably undermine a unified national banking structure at the expense of New York's citizens and in derogation of the will of Congress and the Founding Fathers.

ARGUMENT

REGIONAL PROTECTIONIST STATUTES, SUCH AS THE NEW ENGLAND COMPACT, OFFEND THE COMPACT AND COMMERCE CLAUSES OF THE CONSTITUTION BECAUSE THEY IMPERMISSIBLY BURDEN THE SOVEREIGN INTERESTS OF EXCLUDED STATES.

The New England Compact favors the interests of a few states in one region of the nation at the expense of all other states and, particularly, at the expense of financial centers like New York. The creation of this compact is wholly repugnant to the notion of equal states' rights inherent in our nation's scheme of cooperative federalism. *See, Virginia* v. *Tennessee,* 148 U.S. 503 (1893).

The purpose of the New England Compact is to exclude the major New York banks from participating in the New England banking market. Its effect, however, is more far-reaching. The compact arose out of fear that a free and

open market place would quickly result in the take-over of New England banks by the big money center banks located in New York. Nevertheless, there is little doubt that the creation of arbitrary geographical barriers by the New England Compact has nationwide implications that extend beyond New York's borders. Similar compacts enacted in other regions (*see* A37-38) would pose a serious threat to federal supremacy in banking regulation and to the continued cooperation among sister states.

For the reasons that follow, the New England Compact should be held invalid under the Compact and the Commerce Clauses, and New York's sovereign interests, and the similar interests of all other excluded states, in participating in interstate banking should be recognized and protected.

A. The New England Compact Violates the Compact Clause

The Compact Clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." On repeated occasions, this Court has refined the meaning of the general prohibition contained in the Compact Clause. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978); *New Hampshire* v. *Maine,* 426 U.S. 363 (1976); *Virginia* v. *Tennessee,* 148 U.S. 508 (1893); *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657 (1838). The principles developed in these cases establish that the New England Compact, in every respect, is precisely the type of agreement or compact which this Court has held to require explicit congressional approval.

Early decisions of this Court made it clear that the Compact Clause was intended to prevent individual states from combining to form compacts, without the consent of Con-

gress, to the detriment of the states excluded from such compacts. In *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833), Chief Justice Marshall wrote that the Compact Clause generally restrains "state legislation on subjects . . . in which the people of all the states feel an interest" because if a state enters into a compact with another state, "for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution."

Some years later, in a case involving a boundary dispute between the states of Florida and Georgia which was to be settled by a compact between these two states, this Court called the Compact Clause "one of the great safeguards of the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others." *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855). Similarly, in *Wharton* v. *Wise*, 153 U.S. 155 (1894), this Court found that the intent of the Articles of Confederation provision, later adopted in the Constitution as the Compact Clause, which provided that "no two or more states should enter into any treaty confederation or alliance whatever between them without consent of the United States in Congress assembled," was to "prevent any union of two or more states, having a tendency to break up or weaken the league between the whole. . . . " *Id.* at 167. These decisions reaffirmed the principles advanced by the Framers of the Constitution—that the concept of a United States comprised of a supreme federal government and the several equal states would be meaningless if the individual states remained free to band together for their mutual benefit and to the detriment of the Union and the other states.

The legislation enacted by the states of Connecticut and Massachusetts constitutes a compact within the meaning

of the Compact Clause. Both states enacted virtually identical reciprocal and exclusive legislation within a six-month period between December of 1982 and June of 1983. That fact alone is sufficient to find that a compact exists. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 470 (1978). *Accord,* F. Frankfurter and J. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 735-48 (1925). Indeed, legislators in Massachusetts and Connecticut made no effort to conceal that their intentions were focused on collective efforts.

A formal meeting of representatives of the New England states was held (A162-168) to consider the question of regional interstate banking, and at that meeting the New England Committee to Study and Promote Regional Interstate Banking was formed (A161). In addition, the sponsor of the Massachusetts statute testified at hearings on regional interstate banking held in Connecticut and Rhode Island. Given the enactment by these states of reciprocal legislation within such a short time period, and the consistent cooperation between Massachusetts and Connecticut on this matter, there can be no question that a compact exists. (*See also, Virginia* v. *Tennessee,* 148 U.S. at 517-18, where the Court held that the terms "agreement" or "compact" as used in the Compact Clause are "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects . . . ").

The only remaining issue is whether the New England Compact is a compact which requires the consent of Congress. In *Virginia* v. *Tennessee,* 148 U.S. at 518,* this

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* *Virginia* v. *Tennessee* involved a boundary dispute in which the Court exercised original jurisdiction. There, Justice Field enumerated

(footnote continued on following page)

Court posited two types of compacts:

1. [T]hose . . . to which the United States can have no possible objection or have any interest in interfering with, ...

2. [T]hose which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

Compacts in the first category do not require congressional approval, whereas compacts belonging to the latter category do—that is, compacts "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States"—require the consent of Congress. *Id.* at 519.

This Court continues to apply Justice Field's formulation in determining when Congressional approval of a compact between states is required. Recently, in *U.S. Steel Corp.* v. *Multistate Tax Commission,* this Court reviewed

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(footnote continued from preceding page)

four detailed examples of interstate cooperation that would not require congressional approval. These examples consist of the following:

(1) an agreement between States for one to acquire a parcel of land within the borders of another State;

(2) an agreement between two States for one to ship merchandise over a canal owned by the other;

(3) an agreement between two States to jointly drain a malarius disease producing district on the border between two States;

(4) an agreement between two States to unite to combat an invasion or epidemic.

148 U.S. at 518.

the Multistate Tax Compact, which was not approved by Congress, but was agreed to by 21 states. The principal purpose of that compact was to create a uniform and compatible mechanism for taxing interstate business. This Court held that Congressional approval was unnecessary.

In finding that the Multistate Tax Compact did not interfere with federal supremacy, the Court looked at both the amount of federal involvement in the subject covered by the compact and the result or effect of the compact on states which did not join. *Id.* at 473-78. First, the Court found that there was not a substantial federal involvement in the area of taxation of interstate business. *Id.* at 474-76. Second, the Court held that because all non-member states were free to join and there was no undue economic pressure to join, the sovereign rights of non-member states were not impaired. *Id.* at 478.

Unlike the compact involved in *U.S. Steel,* the New England Compact requires congressional approval because of the significant amount of federal involvement in the subject area and the effect of the compact on the sovereign rights of excluded states, such as New York. First, the federal government, in establishing the elaborate federal apparatus for the regulation of bank holding companies (including the requirement of federal approval of all acquisitions of banks by bank holding companies), has since 1956 exhibited a profound interest in the entire field of bank holding company regulation.

The New England Compact, in fact, also directly conflicts with a recent Act of Congress, thus making the potential for interference with federal supremacy almost a certainty. This Court noted in *U.S. Steel* that *potential* conflict is as pertinent to the inquiry of federal involvement as is actual conflict. 434 U.S. at 472.

The Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. § 1823(f) (Supp. 1983), provides that the Federal Deposit Insurance Company (FDIC) shall arrange acquisitions by out-of-state holding companies of financially threatened or closed banking institutions having assets over $500,000,000. The statute further directs the FDIC in authorizing such acquisitions to consider the following priorities:

> (i) First, between depository institutions of the same type within the same State;
>
> (ii) Second, between depository institutions of the same type in different States;
>
> (iii) Third, between depository institutions of different types in the same State;
>
> (iv) Fourth, between depository institutions of different types in different States;
>
> In considering offers from different States, the Corporation shall give a priority to offers from adjoining States.

12 U.S.C. § 1823(f)(6)(B)—(C).

A comparison of the Garn-St Germain Act with the New England Compact illustrates the potential for direct encroachment upon federal supremacy. For example, the FDIC might decide to arrange a merger between two like institutions, one located in New York and one located in Connecticut. Despite strong federal approval for such a merger, it would be specifically prohibited by the New England Compact.

Second, the New England Compact has a decidedly adverse impact on the sovereign rights of excluded states, and particularly those of New York. For example, unlike the compact at issue in *U.S. Steel,* all states outside New

England are prohibited from having their banks compete in the New England market. Even though New York has enacted national reciprocal legislation, it cannot join the New England Compact and its banks may not acquire New England banks. Moreover, by virtue of the New England Compact created by the Connecticut statute, *no* New England bank wishing to acquire a bank in Connecticut is permitted to merge, acquire or establish a bank in New York, or it will automatically lose its status as a New England bank. It is highly unlikely, therefore, that if this compact survives, any New England bank will ever seek to acquire or establish a bank in New York, even though New York may wish to permit such an acquisition under New York law and even though New Yorkers might benefit from it.*

Contrary to this Court's directive in *U.S. Steel,* the Second Circuit failed to attach any weight whatsoever to the fact that the New England Compact adversely affects the rights and interests of non-member sister states. It simply ignored the threat the Compact creates to an area of great economic significance to New York and other non-member states. And, it failed to address whether the compact impairs sovereign rights of non-member states frustrating their rights under the Douglas Amendment to permit New England banks to acquire banks in their states.

In sum, given the overriding federal interest in the free flow of interstate commerce and in the regulation of bank holding companies, it is plain that the New England Com-

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* It is significant to note too that petitioners Northeast Bank Corp., a New England bank holding company, and its banking subsidiary, Union Trust Co., are the primary opponents of the New England Compact. Their attempt to remain competitive with the larger New England banks, by merging with a New York bank, is being thwarted by the Compact.

pact is the type of compact which requires congressional consent and is invalid until such approval is provided.

B. The New England Compact Violates The Commerce Clause

There is little question that the Connecticut and Massachusetts statutes are openly protectionist, anti-competitive and a substantial burden on interstate commerce.* The Second Circuit correctly observed in this case that such state laws violate the Commerce Clause absent "clear congressional authorization" (A30). However, that court then erred when it found such authorization in Section 3(d) of the Bank Holding Company Act—the so-called Douglas Amendment (A 31).

The decision of the court below does not elaborate on the basis for this finding. Indeed, some uncertainty about its holding is apparent from the fact that the court expressed it as a "belief":

> "We believe that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here." (A 31). (Emphasis added).

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* When a state restrains commerce in a manner that is openly protectionist, this Court has applied a *per se* rule of unconstitutionality. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). Where the burden imposed by a state is an even handed and incidental one necessitated by a legitimate local concern, a balancing test is employed and the statute held constitutional only if the burden imposed on interstate commerce is not disproportionate to the local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The New England Compact fails both tests. A more blatantly protectionist scheme could hardly be imagined. Moreover, as the Federal Reserve Board found, "there are less restrictive means than a discriminatory geographic restriction to accomplish the objectives" of the Connecticut and Massachusetts legislatures (A60).

The language of the Douglas Amendment falls far short of supporting the Second Circuit's "belief" that Congress intended to authorize states to discriminate against their sister states, as Massachusetts and Connecticut have done. This Court has observed that the object of the Douglas Amendment was much narrower:

> "Preliminarily, it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (Emphasis in original; footnote omitted).

Nor does the scant legislative history of the Douglas Amendment evince any congressional intent to authorize discriminatory regional alliances. As the court below noted, at the time the amendment was enacted no state permitted its banks to be acquired by foreign state bank holding companies (A 28). Thus, in the words of Senator Douglas, the effect of the amendment would be "to bar the expansion of bank holding companies across State lines" while permitting States "to make explicit provision for such purchases and acquisitions if they so decided." (A 28-29).

Moreover, Senator Douglas modelled his amendment on the McFadden Act,* legislation which clearly evinces a

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* "What our amended aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act . . ." 102 Cong. Rec. 6858 (1956) (A28)

congressional intent to encourage rather than restrict competitive equality among banks. The McFadden Act* was a response to the inherent competitive tension where state and national banks coexist in the same area. It permitted national banks to establish branches only if state banks could do likewise under state law. The proponents of the McFadden Act were not concerned with the effect that the local state laws would have upon interstate commerce. They were concerned only with the effect the Act might have upon state laws that gave state-chartered banks a competitive advantage over national banks within their borders. Representative McFadden characterized his bill as one which was intended to establish "competitive equality" among *"all members* of the Federal Reserve System." 68 Cong. Rec. 5815 (1927) (emphasis added).

Senator Douglas assuredly did not intend by his amendment to create a mechanism for each state to abandon the established national policy of competitive equality in favor of that state's self-serving bank scheme. Rather, his aim undoubtedly was to enable individual states to allow expansion within a national banking system which would have otherwise prohibited *all* acquisitions by out-of-state bank holding companies.

The scheme devised by Massachusetts and Connecticut is inimical to the vision of free and unencumbered interstate commerce held by the Framers of the Constitution. When Congress enacted the Douglas Amendment, it did not envision that states would use the authority given to

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* While the legislative history of the Douglas Amendment is sparse, the legislative history of the McFadden Act is detailed and has been described by this Court. *See First National Bank* v. *Walker,* 385 U.S. 252 (1966); *First National Bank* v. *Dickson,* 396 U.S. 12 (1969).

them to create regional protectionist schemes that unduly burden interstate commerce. Absent clear and unequivocal congressional authorization, the New England Compact must fall.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the Connecticut and Massachusetts statutes should be declared unconstitutional.

Dated: New York, New York
February 21, 1985

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York

Attorney for Amicus Curiae

ROBERT HERMANN
Solicitor General

R. SCOTT GREATHEAD
First Assistant Attorney General

JUDITH T. KRAMER
HOWARD L. ZWICKEL
Assistant Attorneys General

DERRICK CEPHAS
Deputy Superintendent of Banks and Counsel

MICHAEL SCHUSSLER
Assistant to the Superintendent

of Counsel

No. 84-363

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

IRA M. MILLSTEIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel for Petitioner Citicorp

GEORGE D. REYCRAFT
CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005
(212) 908-7000
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

REX E. LEE
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Federal Respondent

[*List of Additional Counsel Printed on Inside Cover*]

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1984
CERTIORARI GRANTED JANUARY 7, 1985

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
(617) 227-5020

Counsel for
Intervenor-Respondent
Bank of New England
Corporation

THOMAS KILEY
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1033

Counsel for
Intervenor-Respondent
Commonwealth of Massachusetts

BERTRAM M. KANTOR
WACHTELL, LIPTON, ROSEN
& KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for
Intervenor-Respondent
CBT Corporation

JOHN G. HAINES
Assistant Attorney General
P.O. Box 120
Hartford, Connecticut 06101
(203) 566-4899

Counsel for
Intervenor-Respondent
State of Connecticut

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 371-6000

Counsel for
Intervenor-Respondent
Hartford National Corporation

STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Counsel for
Intervenor-Respondent
Bank of Boston Corporation

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APPENDIX A

Relevant Docket Entries and Important Dates

Chronological List of Important Dates in the Proceedings Before the Board of Governors of the Federal Reserve System

Date:	*Event:*
08/05/83	Application submitted by Bank of New England Corporation to merge with CBT Corporation
10/05/83	Letter and other documents from Northeast Bancorp, Inc. filed in opposition to Bank of New England Application
10/19/83	Application submitted by Hartford National Corporation to acquire Arltru Bancorporation
12/05/84	Letter and Memorandum from Citicorp filed in opposition to Bank of New England Application
12/16/84	Letter and Memorandum from Citicorp filed in opposition to the Hartford National Corporation Application
02/02/84	Application submitted by Bank of Boston Corporation to acquire Colonial Bancorp, Inc.
03/08/84	Letter and Memorandum from Citicorp filed in opposition to Bank of Boston Corporation Application
03/26/84	Order of Board of Governors of the Federal Reserve System Approving Bank of New England Corporation Application
03/26/84	Order of Board of Governors of the Federal Reserve System Approving Hartford National Corporation Application
05/18/84	Order of Board of Governors of the Federal Reserve System Approving Bank of Boston Corporation Application
06/11/84	The Board of Governors of the Federal Reserve System Stays Its Order Approving Bank of Boston Corporation Application

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Chronological List of Relevant Docket Entries and Important Dates in Proceedings Before the United States Court of Appeals for the Second Circuit

Date:	*Docket Entry or Event:*
03/27/84	Case docketed
04/04/84	CBT Corporation and Bank of New England Corporation granted leave to intervene
04/23/84	Hartford National Corporation granted leave to intervene
04/23/84	Connecticut granted leave to intervene
04/23/84	Massachusetts granted leave to intervene
04/24/84	Stay pending expedited appeal granted
05/14/84	Oral argument
05/22/84	Petition for review of Board Order Approving Bank of Boston Corporation Application filed
06/18/84	Review of Bank of Boston Corporation Order consolidated
06/19/84	Bank of Boston Corporation motion to vacate 06/11/84 Board stay of Order Approving Bank of Boston Corporation Application denied
08/01/84	Decision and Judgment affirming Board Orders
08/09/84	Stay of Mandate
08/22/84	CBT Corporation, Bank of New England Corporation, Hartford National Corporation, Bank of Boston Corporation and State of Connecticut motions for reconsideration of 08/09/84 stay of Mandate denied
09/06/84	Petition for certiorari filed
01/07/85	Certiorari granted

APPENDIX B

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of August one thousand nine hundred and eighty-four.

Present: HON. RICHARD CARDAMONE
HON. GEORGE C. PRATT Circuit Judges
HON. DUDLEY B. BONSAL, District Judge*

84-4047, 84-4051, 84-4053, 84-4081

NORTHEAST BANCORP, INC. and UNION TRUST COMPANY,
Petitioners-Appellants,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent-Appellee.

CITICORP, a Corporation,
Petitioner,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

---

* United States District Court for the Southern District of New York, sitting by designation.

A petition for review of orders of the Federal Reserve Board,

These causes came to be heard on the certified list of items comprising the record of the Federal Reserve Board and was argued by counsel,

Upon Consideration Thereof, it is ordered, adjudged and affirmed decreed that the orders of the Federal Reserve Board be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the petitioners.

Elaine B. Goldsmith, Clerk

/s/
By: Edward J. Guardaro
Deputy Clerk

APPENDIX C

H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955) (Excerpt)

BANK HOLDING COMPANY ACT OF 1955

MAY 20, 1955.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. SPENCE, from the Committee on Banking and Currency, submitted the following

REPORT

[To accompany H. R. 6227]

* * *

Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests. The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the community's industrial and commercial activities and from the farming population within its vicinity or trade area. Its activities are usually fully integrated with the local economic and social organization. The bank holding company device threatens to destroy this democratic grassroots institution.

Your committee believes that the destruction of the American unit banking system, resulting in the further

concentration of credit facilities, would have revolutionary effects upon our free-enterprise system. Ultimately, monopolistic control of credit could entirely remold our fundamental political and social institutions.

The time for action is now. We dare wait no longer, for already we are rapidly following the example of England whose many banks became the Big Five. She finally passed a law against further concentration. The Bank of England has been nationalized. France has nationalized its few banks. The same will inevitably come to pass here unless we forestall it by legislation.

* * *

In the past, Congress has repeatedly been urged both to permit national banks to carry on branch banking across State lines and to allow them to operate interstate branches without regard to State branch banking laws. The Congress however has steadfastly respected the rights of the States to specify the extent to which branch banking shall be practiced within their respective borders. In fact, the Federal law authorizes National banks to have branches only to the extent that State banks are so permitted under the law of the State in which the national bank is located. This establishes parallel treatment of branches as regards banks whether State or federally chartered. Although this equality exists with respect to branches, States have no way to protect themselves against an outside bank holding company coming in and buying stock in banks, especially national banks, located within their borders.

* * *

The local independent bank is itself, of course, an ideal small-business enterprise. Local people get together, they invest their own capital, they select their own management

and solicit the deposits of the community in which they are located. They then take those deposits and put them out to work for the benefit of the people living in that community. Moreover, because of the FDIC, the Federal Reserve System, and its corresponding banks, the local bank is in an advantageous position to meet the changing needs of its community.

Your committee should like to reemphasize the fact that this is the only country left where most communities are served by home-owned and home-managed banks which are aware of and responsive to the needs of the people of their areas. Our independent banking system has been a vital factor in the development of the United States. Like yeast cells in a loaf of bread, each working in its immediate area, our banks scattered throughout the country have cooperated to produce the greatest and most general economic development the world has known.

Other countries must depend on 3, 4, or 5 banks having up to thousands of branches. Policies and important credit decisions are made hundreds or thousands of miles from many of the branches. The interest of an enterprising local customer may run counter to that of a large main office account, in which event the former might suffer. This inevitably tends toward concentration in all lines, cartels, the stifling of new enterprises, and stagnation—what has been termed the "mature economy."

* * *

APPENDIX D

The Congressional Record (Excerpts)
Senate, April 23, 1956
[Page 6752]

Mr. ROBERTSON.

* * *

. . . the committee did not deem it necessary or advisable to insert in the bill an absolute prohibition against the expansion of bank holding companies across State lines as contained in the House bill and urged by the Independent Bankers Association.

* * *

The statement made by Senator Maybank in 1952 is very pertinent on the question of States' rights. Senator Maybank said:

> In the name of States' rights the position is taken that no bank holding company should be permitted to acquire bank stocks or assets across State lines or in any State in which branch banking is not allowed.
>
> Now, to me, States' rights means the right of a State to choose its own course of action on a matter within its own jurisdiction and not have the Federal Government make up its mind for it. This is the positive approach. A State should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders. Any Federal legislation which forces a State to change its policies with respect either to branch banking or holding companies would be an unwarranted interference with States' rights. . . .

* * *

Senate, April 24, 1956
[Pages 6856-62]

Mr. DOUGLAS. Mr. President, I call up amendment designated 4-16-56-A, offered on behalf of myself and the Senator from Oregon [Mr. MORSE], the Senator from Mississippi [Mr. STENNIS], the Senator from New York [Mr. LEHMAN], the Senator from Maine [Mr. PAYNE], the Senator from North Carolina [Mr. ERVIN], the Senator from Wyoming [Mr. O'MAHONEY], and the Senator from New Mexico [Mr. CHAVEZ], and ask that it be read.

The PRESIDING OFFICER. The amendment offered by the Senator from Illinois for himself and other Senators will be stated.

The LEGISLATIVE CLERK. On page 8, between lines 6 and 7, it is proposed to insert the following new subsection:

> (d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

Mr. DOUGLAS. Mr. President, the pending bill, and the amendment which has just been read, are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power, and instead to keep the private control of credit diffused as much as possible. For we know that when the credit resources of a country become concentrated and fall into a few hands, then the industry and trade of that country also become concentrated.

Big banks commonly find it much easier and more to their liking to do business with big business rather than with little business.

JACKSON FOUGHT CENTRALIZATION OF BANKING AND CREDIT

Andrew Jackson realized all this when he faced Nicholas Biddle and the Second Bank of the United States. Biddle, building on the traditions of Hamilton, and supported by the Whigs under Webster and Clay, was attempting to make his bank the dominant financial institution of the whole country. He was fast succeeding in this attempt when Andrew Jackson took him on. Jackson not only opposed the private creation of monetary purchasing power by the bank, but also its tendency toward monopolizing credit by driving out the small banks. He wanted credit and banking to be decentralized and diffused so that men might be free.

In that terrific struggle, lasting over a decade, Jackson, aided by Thomas H. Benton, saved economic democracy in this country for a time by denying a new charter to Biddle's bank. And although the Whigs tried hard to revive Biddle's power, they were turned back by the Democrats and by John Tyler at a later date.

Similarly, when Salmon P. Chase created the national banking system during the Civil War, he not only desired to create a market for Government bonds by building up a supplementary currency built upon them, but he also wanted to have so many national banks created by the lure of double interest that the new banking system would also be diffused like that of the various State systems.

In short, we who are struggling to prevent the concentration of financial power from becoming greater are carrying on the fighting tradition of Andrew Jackson who wanted a competitive and a free America, and not one dominated by a relatively small group of financiers and industrialists.

DANGERS OF CONCENTRATED BANKING POWER SHOWN IN EXPERIENCE OF BRITAIN

If we look abroad we see plenty of corroboration for our fears about the concentration of banking powers. A century and a quarter ago, England had large numbers of provincial bankers who helped to finance the relatively small industries of their localities. But gradually these private bankers were bought up by and merged with the bigger houses, so that for many years now there have been virtually only five banks which have mattered in England and Wales, namely, Barclays, Lloyds, Midland, Westminster, and National Provincial. These firms do more than three-quarters of the banking business of the entire United Kingdom, including Scotland and Northern Ireland.

Along with this concentration in banking, and partially caused by it, there has developed a concentration in manufacturing and in industry.

• • •

CONCENTRATIONS IN BANKING AND CREDIT ARE ALSO SERIOUS DANGERS IN THIS COUNTRY

All these examples paint an image of what is likely to happen in this country if we permit the concentration of banking and credit, which has already gone far, to go farther. For here, as elsewhere, the control over credit is moving into fewer and fewer hands.

At the same time, industry has been moving out of competition into closer and closer concentration—monopoly and quasi-monopoly. This has been helped by the big banks. If we do not wish to travel the path of Canada, Great Britain, and Germany, we should do something effective to check and, if possible, to roll back the concentration of banking and credit. For he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well.

Unfortunately, we have already traveled very far down the way of the concentration of credit and banking. This has been done by the growth of the original home offices of the big banks, such as the Continental and First National Banks of Chicago and the Chase and National City Banks of New York, but also by three other forms of accretion, namely, mergers, branch banking, and bank holding companies.

* * *

Thus, nearly 1,100 banks merged during these 9 years, with the numbers greatly increasing during the last 3 years. This, moreover, was during a period when the total number of banks in the country was decreasing by 475, from 14,759 to 14,284. This was a decrease of 3.2 percent.

Among the big mergers were those in New York City of the Chase National Bank and the Bank of Manhattan, of

the National City and the First National, the Chemical Bank & Trust and the Corn Exchange, and the Bankers Trust and Public National. These mergers alone involved $19½ billion of assets and over 57 percent of the banking facilities of New York City. There have been a great many other mergers in other portions of the country.

BANK BRANCHES HAVE ALSO MULTIPLIED

The second way control over credit becomes concentrated is through the opening of branches. The organization of branch banks proceeded very rapidly in the 1920's, and to check their growth various States passed laws limiting, and in some cases preventing it, as in the case of Illinois. National banks had previously been implicitly prohibited from opening branches, and there was a strong movement to remove this prohibition and completely open up the field for the national banks. This, however, was not done. Instead, by the McFadden Act and other measures, national banks have been permitted to open branches only to the degree permitted by State laws and State authorities.

I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them and that is the provision of the McFadden Act.

* * *

HOLDING COMPANIES HAVE ALSO EXPANDED RAPIDLY

The third way in which credit is becoming concentrated is through the device of holding companies. Holding companies have been developed in part— I would say largely— in order to get around restrictions on branch banking. A State will prohibit branch banking, and so a holding company will be organized, which will buy up individual banks and operate them, in effect, within the State, and which sometimes buy up banks in other States and also operate them, in effect, as branches. Even though local officers and directors are used, the direction rests in the holding company. Two out-of-State holding companies have invaded Illinois in just this way, and each company controls three banks in Illinois, despite our Illinois laws prohibiting branch banking.

Now, the two holding companies which operate out of Minneapolis—namely, the First Bank Stock Corporation of Minneapolis, which had 75 banks and 6 branches, and which operated in 4 States, with total deposits of $1,352,000,000 as of the end of 1954, and the Northwest Bancorporation of Minneapolis, which had 72 banks and 22 branches in 7 States with deposits of $1,583,000,000—have been developed and formed largely because of restrictions on branch banking in Minnesota, Nebraska, North Dakota, South Dakota, and Montana. Since branch banking was prohibited or restricted, at least originally, these holding companies buy up the controlling interests in the banks and operate them as branches.

* * *

In New York the State is divided into 10 zones. Branch banking is permitted within each of the zones, but a bank cannot have branches in another zone. What happened

there? The Marine Midland Co., of Jersey City, was organized, and it bought banks in each of the 10 zones and established 125 branches. As of the end of 1954, it had total deposits of $1,635,000,000. Now, the letter of the law is complied with, but, in effect, each of those 10 banks—each one within a given zone—is operated as a unit of a centralized banking system.

TRANSAMERICA CORP. IS LARGEST HOLDING COMPANY AND GROWING RAPIDLY

The biggest holding company is, of course, Transamerica, which was originally closely affiliated with the Giannini banking interests and the Bank of America, but which has attained greater independence in recent years.

* * *

But all that the Senator from Illinois is at present trying to do is to prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so.

* * *

PENDING AMENDMENT PREVENTS BANK ACQUISITION BY OUT-OF-STATE HOLDING COMPANY UNLESS STATE LAW EXPRESSLY PERMITS

Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States. At present no State specifically grants such permission. Therefore the immediate practical effect would be to bar the expansion of bank holding companies across State lines. But the amendment would leave the way open for States to make explicit pro-

vision for such purchases and acquisitions if they so decided. If they were to do so, then such expansion would be subject to the rules and judgment of the Federal Reserve Board.

* * *

I wish to repeat that, so far as inter-state acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other States, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

Anyone who favors States rights, it seems to me should support my amendment.

* * *

I am not interested in having a bank situation in which there are only two banks in a State competing with each other. I am interested in a bank situation in which there are a large number of banks with no monopoly and with a dispersion of power.

* * *

Mr. BENNETT. Mr. President, I have grave doubt about the wisdom of the amendment of the Senator from Illinois [Mr. DOUGLAS] in the form in which it is presented. I recognize that it is less severe than the House language which contains a flat, unequivocal prohibition against bank holding companies crossing State lines. But it is only slightly less severe in that it makes a blanket prohibition

which can only be lifted by special affirmative action by the States and in its present form creates an evil which I must oppose.

The net effect of the amendment is to require every State that does not now have legislation prohibiting bank holding companies to discriminate in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the discrimination.

So far as I can learn, no State has of its own volition, and by action of its own legislature, set up such a discrimination. There are some States, including the State of Illinois, which prohibit all bank holding companies, domestic as well as foreign. This is not discriminatory. But I know of no State that permits domestic bank holding companies to operate within its borders and shuts out their counterparts residents in other States. That would be the effect of this amendment.

For Congress to require discrimination in interstate commerce, and then leave it to the several States to correct it, is a strange approach, out of harmony with the basic American concept of fairness and fair play. It smacks a little of the concept that a man is guilty until proved innocent.

It will have two other interesting consequences. It will preserve and protect the status quo in those States in which foreign or domestic bank holding companies are now operating, and will serve to intensify their expansion within those narrowed ranges. This would tend to set up some areas of bank holding company concentration and others that will be free.

I think I can look at this problem objectively. In my State we have two big bank holding companies represented, one foreign and one domestic, and a number of smaller local banking groups. At last count we had 97 banks in the State, 58 in holding companies and 46 operating as independents. So I am in the middle, and can afford to look at the principles involved. Since I want to eliminate rather than create discrimination, and since I want the States left free to act on this subject affirmatively for themselves, and not first be burdened with discrimination by our action, I am forced to vote against the amendment.

* * *

Mr. PAYNE. Mr. President, I ask unanimous consent to have printed in the RECORD, a statement concerning the amendment offered by the Senator from Illinois, for himself and other Senators, and concerning the bill itself.

The PRESIDING OFFICER. Is there objection?

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT BY SENATOR PAYNE

The junior Senator from Maine would like to speak briefly today in support of bank holding company bill S. 2577, now under debate by the Senate. At the very outset, I would like to emphasize my firm faith in the independent banking system which has been the foundation of economic growth in the United States, the traditional source of capital investment, and the holder of the savings of millions of individual Americans. It is my firm belief that S. 2577 with the amendments approved by the Senate Committee on Banking and Currency and with the additional amendment proposed by the senior Senator from

Illinois [Mr. DOUGLAS] will halt the trend toward the destruction of the independent banking system and will preserve independent banking as the financial base of the United States economy.

* * *

Through its ability to cross State lines, the bank holding company can operate in a way closed to the independent bank. The competition presented by a single bank which is a subsidiary of a bank holding company may not in any legal sense be unfair competition, but the fact that it is backed by the powerful assets of a vast bank holding company gives it a competitive advantage that is undeniable. And this competitive advantage springs from the fact that the bank holding company can operate in a manner closed to the independent bank.

* * *

The independent bank is a local operation, owned and managed by citizens of the community in which it operates. The particular financial needs and problems of the community are well-known and thoroughly understood by the directors and officers of the local independent bank who in no small measure contributes to the economic growth and financial well-being of that community. What is important to the community is important to the financial leaders of that community. And in the independent bank those financial leaders are in a position to act in the interests of the community.

* * *

Although I approve of S. 2577 as a definite step in the right direction, it is my feeling that more can be done to insure the preservation of the independent banking system at this time. My distinguished colleague, the senior Senator from Illinois [Mr. DOUGLAS] has introduced an

amendment to S. 2577 which I have cosponsored. This amendment would require that State legislatures pass specific legislation authorizing bank holding companies from another State to acquire interests in State banks located within its borders. The purpose of this amendment is to return to the States their traditional control over the activities of the State banks now nominally under the State's authority.

S. 2577 leaves the control of the future expansion of bank holding companies to the discretion of the Federal Reserve Board. It is not my intention to question the capacity of the Federal Reserve Board to carry out the will of the Congress, but it seems to me that the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion rather than to have it solely under the jurisdiction of the Federal Reserve Board.

Mr. President, in this brief statement, I have not attempted to go into the complexities of S. 2577. I have spoken in very broad terms, and have tried only to outline some of the reasons why I am in favor of S. 2577 with the amendment proposed by Senator DOUGLAS. We now have before us a bill which is just and reasonable. It does not pretend to rectify all the problems involved in bank holding companies. But it will, if enacted, go a long way toward halting the trend toward overconcentration of financial interests in the United States. The Douglas amendment would reestablish State authority over State banks. I am convinced that it will be in the interests of our banking system and in the interests of all the people of this Nation to enact S. 2577 with the Douglas amendment.

* * *

APPENDIX E

Affidavit of Walter J. Connolly, Jr. (April 18, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 84-4047, 84-4051 and 84-4053

NORTHEAST BANCORP INC. and UNION TRUST COMPANY,

Petitioners,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

CITY OF HARTFORD)
) ss:
STATE OF CONNECTICUT)

WALTER J. CONNOLLY, JR., being duly sworn, deposes and says:

1. I am the chairman and chief executive officer of CBT Corporation ("CBT"). Upon consummation of CBT's proposed merger with and into Bank of New England Corporation ("BNE"), I am to become the chairman and chief executive officer of BNE. This affidavit is submitted in opposition to petitioners' applications for a stay of the

effectiveness of the Order dated March 26, 1984 of the Board of Governors of the Federal Reserve System approving the merger of CBT into BNE to be consummated on or after April 25, 1984, the thirtieth calendar day following the effective date of the Order.

• • •

25. Citicorp, the nation's largest and most aggressive banking organization, is a New York bank holding company with almost $130 billion in assets as of 1982 and $134.7 billion as of 1983. *1983 Citicorp Annual Report and Form 10-K* 34 (copy annexed hereto as Exhibit J). By contrast, the combination of BNE and CBT would have total assets of $10.1 billion based on data as of 1982. The assets as of December 31, 1982 of the banking institutions involved in all of the pending interstate bank transactions among New England institutions were:

	Total Assets (millions)
1. BBC	$18,267
2. CBT	5,070
3. BNE	5,065
4. HNC	4,128
5. RIHT	1,930
6. Colonial	1,262
7. Arltru	783
	$36,505

See Association of Bank Holding Companies, *Bank Holding Company Facts* (Spring 1983 Edition) (copy annexed hereto as Exhibit K); *Northeast Bancorp Inc.* v. *Woolf, supra,* Exh. M at 4. If all these institutions were combined into a single entity, that entity would have had total assets

as of 1982 of less than $37 billion, or less than one-third those of Citicorp.

26. Through its subsidiaries, Citicorp had total deposits as of December 31, 1983 of $79.8 billion. *1983 Citicorp Annual Report and Form 10-K* 34 (Exh. J). Not only is this vastly greater than the combined deposits of BNE and CBT as of the same date ($6.6 billion) but it is, in fact, over 30 percent greater than the combined deposits of all commercial banks located in all the New England states as of the same date (57.6 billion). *See* Decision Research Sciences, Inc., *Branch Directory and Summary of Deposits With Market Indicators* (copy of pertinent pages annexed hereto as Exhibit L). Moreover, the total equity capital ($5.8 billion) of Citicorp's principal bank subsidiary (Citibank, N.A.), upon which its lending limits are based, was more than 13 times greater than the combined equity capital of the principal bank subsidiaries of CBT and BNE. *1983 Citicorp Annual Report and Form 10-K* 34 (Exh. J).

27. While seeking to prevent interstate bank acquisitions by CBT, BNE and other New England banking institutions, Citicorp itself has aggressively expanded into a nationwide provider of banking and financial services. Citicorp has deposit-taking capabilities of various kinds in some 17 states and some form of presence in 41 states and the District of Columbia. *1983 Citicorp Annual Report and Form 10-K* 24 (Exh. J). Citicorp has formed "special-purpose" bank subsidiaries under interstate banking statutes in South Dakota and Delaware, and is seeking to open banks in Maryland and Maine. Citicorp also has acquired three huge financially troubled savings and loan associations in California, Florida and Illinois, thereby transforming

itself into one of the nation's leading savings and loan institutions. *Wall Street Journal,* December 19, 1983, at 27 (Exh. I); *1983 Citicorp Annual Report and Form 10-K* 15, 24 (Exh. J). As Citicorp chairman Walter Winston has recently written:

> With our recent acquisition of First Federal in Illinois and New Biscayne in Florida, coupled with Fidelity Savings in California, we have become one of the largest S&Ls in the country.
>
> With these institutions' low operating costs and extremely positive image, our consumer effort has an entirely new dimension. Citicorp now has the ability to take deposits and to provide a full range of consumer deposits in the United States. All this in 10 years.

American Banker, April 9, 1984, at 1 (Exh. I).

* * *

APPENDIX F

Forbes 1983 Annual Banking Survey (April 11, 1983)

100 largest bank holding companies: a statistical profile

Bank	*Total assets*	*Total deposits*	*Company and headquarters*
1	$129,997	$76,538	Citicorp (NY)
2	122,221	94,342	BankAmerica (Cal)
3	80,863	56,858	Chase Manhattan (NY)
4	64,041	43,825	Mfrs Hanover (NY)
5	58,597	37,910	JP Morgan (NY)
6	48,275	27,998	Chemical New York (NY)
7	42,899	28,175	Continental Illinois (Ill)
8	40,884	30,542	First Interstate Bncp (Cal)
9	40,427	24,493	Bankers Trust NY (NY)
10	36,991	25,848	Security Pacific (Cal)
11	35,876	27,419	First Chicago[3] (Ill)
12	24,939	18,195	Crocker National (Cal)
13	24,814	18,180	Wells Fargo (Cal)
14	21,030	14,405	InterFirst (Tex)
15	20,294	12,328	Mellon National (Pa)
16	20,239	15,057	Marine Midland Banks (NY)
17	19,514	14,153	Irving Bank (NY)
18	18,267	11,674	First Natl Boston (Mass)
19	18,217	13,212	Texas Comm Bancshs (Tex)
20	17,585	11,971	Northwest Bancorp (Minn)
21	17,218	11,942	RepublicBank (Tex)
22	16,899	11,877	First Bank System (Minn)
23	16,567	13,355	First City Bancorp (Tex)
24	12,724	8,873	Bank of New York (NY)
25	12,407	8,580	NBD Bancorp (Mich)
26	11,611	7,401	FNC Financial (Pa)
27	11,560	7,922	NCNB (NC)
28	10,190	7,332	Mercantile Texas (Tex)
29	10,028	8,175	Seafirst (Wash)
30	9,280	6,770	Republic New York (NY)
31	8,325	5,756	European American[6] (NY)
32	7,545	5,436	Union Bank[6,7] (Cal)
33	7,378	5,872	Comerica (Mich)
34	7,274	5,521	Southeast Banking (Fla)
35	7,183	5,513	Valley National (Ariz)

Bank	*Total assets*	*Total deposits*	*Company and headquarters*
36	$7,137	$4,897	Harris Bankcorp (Ill)
37	6,932	5,759	Barnett Banks of Fla (Fla)
38	6,927	5,770	Southwest Bancshs (Tex)
39	6,916	4,933	Wachovia (NC)
40	6,823	4,488	National City (Ohio)
41	6,807	5,219	Natl Bank N Amer[6,7] (NY)
42	6,647	2,280	Walter E Heller Intl[9] (Ill)
43	6,504	5,544	Michigan National (Mich)
44	6,301	4,172	Philadelphia Natl (Pa)
45	6,253	4,369	Northern Trust (Ill)
46	6,168	3,673	First Union (NC)
47	6,011	4,971	Allied Bancshares (Tex)
48	6,005	4,286	Citizens & Sthrn Ga (Ga)
49	5,865	4,260	Rainier Bancorp (Wash)
50	5,822	4,495	BancOhio (Ohio)
51	5,756	4,077	US Bancorp (Ore)
52	5,753	4,160	AmeriTrust (Ohio)
53	5,691	3,713	Mercantile Bancorp (Mo)
54	5,433	3,496	First Pennsylvania (Pa)
55	5,376	3,960	Shawmut (Mass)
56	5,284	4,078	Manufacturers Natl (Mich)
57	5,245	3,955	Huntington Bancshs (Ohio)
58	5,122	3,494	Centerre Bancorp (Mo)
59	5,070	3,691	CBT (Conn)
60	5,065	4,089	Bank of New England (Mass)
61	5,055	2,926	Maryland National (Md)
62	5,029	3,896	Banc One (Ohio)
63	5,004	4,095	Sun Banks of Florida (Fla)
64	4,868	3,641	First Natl St Bancorp (NJ)
65	4,848	3,444	United Virginia Bchs (Va)
66	4,836	3,533	First Wisconsin (Wisc)
67	4,812	3,171	Girard (Pa)
68	4,717	3,662	Texas Amer Bancshs (Tex)
69	4,609	3,319	First Security (Utah)
70	4,536	3,058	Fleet Financial Group (RI)
71	4,511	3,018	Trust Co of Georgia (Ga)
72	4,480	3,046	First Atlanta (Ga)
73	4,339	3,535	Midlantic Banks (NJ)
74	4,156	3,576	California First Bk[7] (Cal)
75	4,135	3,507	Bank of Tokyo Trust[6,7] (NY)

Bank	Total assets	Total deposits	Company and headquarters
76	$4,128	$3,322	Hartford National (Conn)
77	4,120	3,019	Pidelcar (Pa)
78	3,915	2.483	State Street Boston (Mass)
79	3,911	3,020	Society (Ohio)
80	3.892	3,015	Lincoln First Banks (NY)
81	3,874	3.107	Virginia Natl Bkshs (Va)
82	3.839	2.728	BanCal Tri-State (Cal)
83	3,820	3,293	First of America Bk (Mich)
84	3,716	3.054	Riggs National (DC)
85	3.710	3.168	BayBanks (Mass)
86	3.653	3,050	Norstar Bancorp (NY)
87	3,522	2,645	United Banks of Colo (Colo)
88	3.498	2,719	Florida Natl Banks (Fla)
89	3,447	2.299	First Maryland Bncp (Md)
90	3,409	2.757	Fidelity Union Bncp (NJ)
91	3,407	2,569	American Security (DC)
92	3,392	2.512	First Tenn Natl (Tenn)
93	3,353	2,530	Bank of Virginia (Va)
94	3,343	2,545	Commerce Bancshares (Mo)
95	3,326	2,203	First Oklahoma Bncp (Ok)
96	3,314	2,489	Intra West Financial (Colo)
97	3,255	2,450	AmSouth Bancorp (Ala)
98	3,232	2.591	United Jersey Banks (NJ)
99	3,225	2,501	Dominion Bankshares (Va)
100	3,215	2,453	Equimark (Pa)

No. 84-363

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS NORTHEAST BANCORP, INC. AND UNION TRUST COMPANY

GEORGE D. REYCRAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:
JOHN BOYER
JEFFREY Q. SMITH
GREGORY SCOTT MERTZ
JOSEPH POLIZZOTTO
ALYSE GRAY

DANIEL GLASSBERG
Corporate Counsel
637 West Avenue
Norwalk, Connecticut 06850
(203) 838-4341

CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038

52pp

Questions Presented

1. Whether reciprocal state statutes that boycott interstate bank acquisitions by holding companies located outside the New England region impermissibly burden the national interests embodied in the Commerce Clause and the Compact Clause of the Constitution?

2. Whether in enacting the Douglas Amendment to the Bank Holding Company Act of 1956 Congress authorized the states to create geographically restrictive interstate banking regions?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. The Rule 28.1 listing of petitioners' parent companies, subsidiaries and affiliates appears in the Appendix to the Petition for Certiorari ("Pet. App.") at A1.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,

Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS NORTHEAST BANCORP, INC. AND UNION TRUST COMPANY

Opinions Below

The opinion of the Court of Appeals (reported at 740 F.2d 203) is reproduced at Pet. App. A21-A33. The judgment is reproduced in the Joint Appendix ("J. App.")

at A3. The order of the Board of Governors of the Federal Reserve System (the "Board") approving the merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT") is reported at 70 Fed. Res. Bull. 374 (1984) (Pet. App. A34-A71); the Board's order approving the acquisition by Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru") is reported at 70 Fed. Res. Bull. 353 (1984) (Pet. App. A72-A78); and the Board's order approving the acquisition by Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial") is reported at 70 Fed. Res. Bull. 524 (1984) (Pet. App. A79-A86).

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1984. The petition for a writ of certiorari was timely filed on September 6, 1984, and was granted on January 7, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause (Art. I, § 8, cl. 3) and the Compact Clause (Art. I, § 10, cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Connecticut statute, 1983 Conn. Act 83-411 (Reg. Sess.) (to be codified at Conn. Gen. Stat. Ann. § 36 Pts. 552-57); and a Massachusetts statute. Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984). These constitutional and statutory provisions are reproduced at Pet. App. A95-A102.

Statement of the Case

Petitioners challenge reciprocal Connecticut and Massachusetts statutes that permit full banking services to be

offered by local bank holding companies throughout the New England region but exclude companies located in other states from offering such services within the region. The statutes in question, and the compact of which they are an integral part, represent an unprecedented frontal assault on both the rights of sister states and the authority of the federal government.

Petitioner Northeast Bancorp, Inc. ("Northeast") is a bank holding company organized under Connecticut law. Its wholly-owned subsidiary, petitioner Union Trust Company ("Union Trust"), is a Connecticut bank that competes directly with banks owned by CBT, HNC and Colonial, among others. On August 3, 1983, The Bank of New York Corporation, a New York bank holding company, agreed to acquire the stock of Northeast.[1]

By virtue of the regional restriction provisions of the challenged statutes, non-New England bank holding companies, such as The Bank of New York, are barred from controlling a Connecticut or Massachusetts bank, and their New England-based acquisition partners, such as Northeast, are unable to serve their shareholders and customers by combining with desirable, non-New England companies.

A. Statement of Facts

In 1956 Congress enacted the Bank Holding Company Act (the "BHCA"), 12 U.S.C. §§ 1841 *et seq.*, which provides, *inter alia,* that a bank holding company [2] may not

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[1] The Bank of New York has moved for leave to file a brief in this action as *amicus curiae.*

[2] A "bank holding company" is defined, for purposes of the BHCA, as a company that controls any bank or bank holding company. *See* 12 U.S.C. § 1841(a)(1).

acquire a bank[3] unless the transaction has been approved by the Board pursuant to specified competitive, financial and other standards. *See* 12 U.S.C. § 1842(a). Section 3(d) of the BHCA, commonly referred to as the Douglas Amendment, absolutely prohibits the Board from approving such an acquisition by any out-of-state bank holding company, unless

> "the acquisition . . . of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

12 U.S.C. § 1842(d).

On December 30, 1982, Massachusetts passed a statute designed to lift the general federal prohibition on interstate banking imposed by the Douglas Amendment.[4] This law authorizes an out-of-state bank holding company to acquire control of a Massachusetts bank if the acquiring institution (and any parent company) conduct their principal banking operations and maintain their principal places of business in one of the other five New England states, and provided that their home states accord reciprocal acquisition privileges to banking institutions located within Massachusetts. The express purpose of this law is to establish a New England banking system and to ensure that only New England banking institutions may avail themselves of its benefits. *See* pp. 14-15, *infra*.

In an effort to convince the other New England states to "join the Massachusetts plan and set up a real New

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[3] In relevant part, 12 U.S.C. § 1841(c) defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

[4] Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984) (Pet. App. A101-A102).

England system" (Pet. App. A189; A162-A168), the principal sponsor of the Massachusetts Act, State Senator John Brennan, convened a meeting of bankers, regulators, legislators and others from the several New England states in February 1983. Thereafter, on June 8, 1983, Connecticut enacted an interstate banking statute with reciprocity and regional restriction provisions modeled on the Massachusetts Act.[5] On May 17, 1983, Rhode Island enacted similar reciprocal, regionally restrictive legislation.[6]

The Massachusetts, Connecticut and Rhode Island statutes create a "New England Compact" and are strikingly different from any prior state law designed to lift the Douglas Amendment's ban on interstate bank acquisitions. While additional states had previously passed laws that authorized interstate acquisitions, none of these discriminated on the basis of geographic origin.[7]

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[5] 1983 Conn. Act. 83-411 (Pet. App. A97-A100). Senator Brennan testified before the Connecticut Legislature and recommended the "adoption of a regional approach to interstate banking." In his view, the bill that Connecticut ultimately enacted bore a "remarkable similarity to the Massachusetts [Act] . . . [and] would be a very very good companion to the Massachusetts concept. . . . " (Pet. App. A154). *See also* Conn. Senate Debate at 70 (Sen. Sullivan) (Pet. App. A160); Conn. House Debate at 269 (Rep. Flinn) (Ct. App. JA833).

[6] R.I. Pub. Law S. 0661 Sub. A (Pet. App. A103-A106). The regional restriction provision of the Rhode Island Act expires on July 1, 1986.

The other New England states have not followed suit. Maine permits virtually unlimited interstate bank acquisitions. Me. Pub. L. 1983, ch. 302 § 2, as amended (1984). Neither New Hampshire nor Vermont has enacted any applicable statute.

[7] For sixteen years following passage of the Douglas Amendment no state sought to authorize any interstate bank acquisitions. The barrier was first broken in 1972 when Iowa enacted a statute that allowed the only out-of-state bank holding company that owned any Iowa banks to maintain and expand its in-state banking activities.

(footnote continued on following page)

The New England Compact is serving as the model for regionally restrictive interstate compacts that are forming in other sections of the country. As the Board has observed, "no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country" (Pet. App. A37). Since the Board's March 26, 1984 approvals of the BNE and HNC applications, Kentucky, Utah, Florida, North Carolina and South Carolina have enacted regionally restrictive interstate banking statutes. The latter three states, together with Georgia, have now established a Southeast banking region. (Pet. App. A232; A245).[8]

The proponents of regionally restrictive interstate banking compacts have attempted unsuccessfully to persuade

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(footnote continued from preceding page)

Iowa Code Ann. § 524.1805. In *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), this statute survived constitutional challenge under the Equal Protection and Supremacy Clauses. Two other states have similar grandfathering statutes. Fla. Stat. Ann. § 658.29 (West Supp. 1983); Ill. Ann. Stat. ch. 17 § 2510 (Smith-Hurd 1981).

Six states now allow out-of-state ownership of banks established for a particular purpose. Del. Code Ann. tit. 5 § 801 *et seq.* (Cum. Supp. 1984); Md. Fin. Inst. Code Ann. § 5-903 (Cum. Supp. 1984); Neb. Rev. Stat. § 8-1512 (Supp. 1983 & 1984); Nev. Rev. Stat. ch. 666.132 (Cum. Supp. 1984); S.D. Codified Laws § 51-16-41 (Supp. 1984); Va. Code § 6.1-392 (1983). Alaska permits interstate acquisitions of banks formed prior to a specific date. Alaska Stat. § 06.05.235 (Cum. Supp. 1984). Oregon and Washington permit the interstate acquisition of failing banks. Or. Rev. Stat. § 716.920 (8) (1983) (limited to contiguous states); Wash. Rev. Code Ann. 30.04.230 (Supp. 1985). New York allows acquisitions by out-of-state bank holding companies whose home states reciprocate. N.Y. Banking Law § 142-b (McKinney Supp. 1983).

[8] Fla. Stat. Ann. § 658.295 *et seq.*; Ga. Code § 7-1-620 *et seq.* (Cum. Supp. 1984); Ky. Rev. Stat. § 287-900 *et seq.* (Cum. Supp. 1984); N.C. Gen. Stat. § 53-209 *et seq.* (Interim Supp. 1984); S.C. Laws tit. 34 ch. 24, 25 (Supp. 1985); Utah Code Ann. 7-1-702 (Interim Supp. 1984).

Congress to enact legislation authorizing their arrangements. United States Senator Paul E. Tsongas and United States Representative Barney Frank, both of Massachusetts, jointly sponsored a bill in Congress that was intended to give federal approval to such compacts (Pet. App. A190-A191). A similar provision was included in an omnibus banking bill, the Financial Services Equity Act, that passed the Senate on September 13, 1984.[9] However, Chairman St Germain of the House Banking Committee gave notice at that time that interstate banking would not be taken up by either his Committee or the House during the session. Commenting on problem areas in the Senate bill, he noted that regional banking compacts "raise significant constitutional questions." [10] House Judiciary Chairman Rodino has also explained that, before enacting any such measure, Congress would need carefully to review the proposal (Pet. Reply Brief at A2).

B. Proceedings Below

1. *The Board's Orders*

Massachusetts and Connecticut bank holding companies quickly sought to take advantage of the statutes challenged here. Immediately following passage of the Connecticut Act in June 1983, BNE, the fourth largest bank holding company in Massachusetts, and CBT, the largest Connecticut bank holding company, agreed to merge. Two months later HNC, the second largest Connecticut bank holding company, agreed to acquire Arltru, the owner of a Massachusetts bank. And, in November 1983, BBC, a Massachusetts bank holding company and the largest such

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[9] *See* S. 2851, 98th Cong., 2d Sess. § 903(2), 130 Cong. Rec. S11, 178 (daily ed. Sept. 13, 1984).

[10] 130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984) (statement of Rep. St Germain).

company in New England, agreed to acquire Colonial, the owner of a Connecticut bank.

In their applications to the Board for approval of their respective consolidations, BNE, HNC and BBC contended that the Connecticut and Massachusetts Acts authorized the Board to approve their transactions under the Douglas Amendment. As interested parties that would be directly injured by consummation of the proposed transactions, [11] petitioners contended before the Board that these state statutes cannot authorize the acquisitions because they are unconstitutional under the Commerce and Compact Clauses of the Constitution.[12]

On March 26, 1984, the Board approved BNE's application. Conceding a lack of competence to address the constitutional issues raised by petitioners, the Board stated that the application should be approved unless the constitutional infirmities of the Connecticut statute were "clear and unequivocal" (Pet. App. A41). Relying on a staff analysis of the impact of the Douglas Amendment on the Connecticut statute's constitutionality (Pet. App. A49-A71), which was adopted as "part of the Board's findings" (Pet. App. A41 n.15), the Board found that this stringent standard had not been met because the Douglas Amendment may arguably be read as a "renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52).

On the same day, the Board, reviewing the Massachusetts statute, approved HNC's application to acquire Arltru,

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[11] *See* 12 U.S.C. §§ 1842(b), 1850; Pet. App. A38 n.6; Pet. App. A233-A237.

[12] Petitioner Citicorp challenged each of these applications. Northeast and Union Trust challenged only the BNE application before the Board, but subsequently broadened their challenge in the Court of Appeals. *See* n.13, *infra*.

stating that "its reasoning with respect to the Connecticut Act's constitutionality applies directly to the Massachusetts Interstate Banking Act" (Pet. App. A75). While these two orders were on review in the Court of Appeals, the Board, on May 18, 1984, approved BBC's application to acquire Colonial, reasoning: "In the absence of a judicial determination regarding the constitutionality of the Connecticut interstate banking statute, the Board believes that it is appropriate in this case to apply the analysis articulated in the [BNE] and [HNC] cases" (Pet. App. A84).

The Board recognized that its tentative resolution of the "unique and fundamental constitutional issues" inherent in discriminatory multistate arrangements such as the New England Compact was "not free from doubt" (Pet. App. A41; A83). As Board Chairman Paul A. Volcker later advised Congress, the Board acted simply on an "assumption of constitutionality" when it approved the applications (Pet. App. A197); according to Chairman Volcker, the Board perceives "serious questions both about the constitutionality of such arrangements and their implications for public policy" (Pet. App. A199).

2. *The Court of Appeals' Decision*

Petitioners sought review of the Board's orders pursuant to 12 U.S.C. § 1848.[13] The orders were stayed pending final disposition.[14] On the merits, the Court of Appeals

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[13] Citicorp filed a petition for review of each of the challenged Board orders. Northeast and Union Trust filed a petition for review of the Board's BNE-CBT order, and were granted the right to intervene in the appeal from the HNC-Arltru order (Pet. App. A94). The Court of Appeals subsequently consolidated the BBC-Colonial appeal with the appeals from the other two orders.

[14] The Court of Appeals stayed the Board's BNE-CBT and HNC-Arltru orders, and the Board stayed the BBC-Colonial order. (Pet. App. A90-A92). *See* Fed. R. App. P. 18.

noted the Board's observation that the Douglas Amendment constitutes a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies" (Pet. App. A29 (quoting BNE order)) and, according "substantial deference" to the Board (Pet. App. A29 (quoting *Securities Industry Association* v. *Board of Governors,* — U.S. —, —, 104 S. Ct. 2979, 2983 (1984)), affirmed the orders on review.

In assessing petitioners' Commerce Clause contentions, the court observed that because the Douglas Amendment imposes a federal ban on interstate bank acquisitions, "the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The court then stated, "Congress may authorize the states to enact statutes which may interfere with interstate commerce" and held: "We believe that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A30-A31).

With regard to the Compact Clause, the court agreed with the Board's finding that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because:

> "[W]e do not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States. However, if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation."

Pet. App. A32.

Following entry of judgment, the Court of Appeals stayed issuance of the mandate pending certiorari proceed-

ings and final disposition by this Court. *See* Fed. R. App. P. 41(b). Thereafter, the Court of Appeals denied motions by the respondent bank holding companies to vacate that stay and issue the mandate forthwith.

Summary of Argument

The Commerce and Compact Clauses of the Constitution were designed by the Framers to insure that tendencies toward state and regional parochialism would be effectively checked in areas of national concern. This was accomplished by entrusting the regulation of interstate commerce to the Congress and by requiring that Congress consent to any multistate arrangement that affects our federal structure. Absent readily identifiable congressional consent to deviations from the norm established by these constitutional provisions, concerted state action that discriminates against interstate trade or otherwise operates to the detriment of the nation is invalid.

The Massachussets and Connecticut statutes are *per se* unconstitutional under the Commerce Clause because they effect a naked geographic boycott against sister states for the purpose of insulating local banking institutions from competition by non-New England firms. Alternatively, under this Court's decision in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), any legitimate local interests promoted by these discriminatory statutes cannot be justified as an incidental burden on interstate commerce.

Further, the multistate, reciprocal character of these laws encourages the kind of disruptive regionalism that the Compact Clause was intended to prevent. They do so by augmenting regional interests at the expense of those of sister states, and by encroaching upon federal banking laws.

Given the clear unconstitutionality of these laws, the determinative issue before this Court is whether, under both the Commerce and Compact Clauses, the Douglas Amendment constitutes congressional authorization for these regionally restrictive interstate banking statutes. This Court's Commerce Clause decisions require that congressional consent to state laws that unduly burden interstate commerce be unmistakably clear. The language of the Douglas Amendment—which imposes a general prohibition on interstate bank acquisitions by bank holding companies but permits the individual states to lift the federal ban—does not suggest, let alone state, that in determining the validity of such state laws, Congress abrogated the negative implications of the Commerce Clause. Nor is there any indication in the legislative history that Congress intended to waive the traditional protections of this Clause.

The text of the Compact Clause requires an even clearer manifestation of congressional consent than that mandated by the Commerce Clause, given the potentially serious threat to national unity posed by exclusionary, multistate action. Whatever the Douglas Amendment may mean, it cannot seriously be contended that it constitutes congressional consent to an interstate compact that had yet to be conceived at the time that statute was passed.

The consent standards of the Commerce and Compact Clauses guarantee that, before a state is subjected to discriminatory legislation by sister states, or our federal structure is otherwise impaired, the national legislature will have focused on the issue, debated the wisdom of imposing discrimination and approved the result. Judicial implication of congressional approval of discriminatory regional combinations would threaten our federal structure with hazards that the burdened interests and the nation at large have not had an opportunity to contest.

ARGUMENT

I

THE NEW ENGLAND COMPACT VIOLATES THE COMMERCE CLAUSE

The Constitution explicitly grants Congress the authority to "regulate Commerce . . . among the several States." [15] The Commerce Clause

> "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes v. *Oklahoma*, 441 U.S. 322, 325-26 (1979). Consequently, while it speaks in terms of powers bestowed upon Congress, the Commerce Clause has also served, since *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852), to limit the power of the states to erect barriers against, or to impose burdens on, interstate trade. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 537-38 (1949); *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977).

This Court consistently has held that when state legislation is openly protectionist—when it overtly discriminates against trade originating from a particular state or states in order to further local economic interests—a *per se* rule of unconstitutionality will be applied. *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). On the other hand, when legislation promotes a legitimate state objective in an

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[15] U.S. Const. art. I, § 8, cl. 3.

even-handed manner, the Court balances the state interests advanced against the federal interest in unencumbered interstate commerce, and requires the state to promote its valid interests with the least possible injury to interstate trade. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The New England Compact enacted by Connecticut and Massachusetts violates both the *per se* and the balancing tests.

A. The New England Compact Is Unconstitutional *Per Se* as a Geographic Boycott Enacted Solely for the Purpose of Economic Protectionism

The plain language and legislative history of the Connecticut and Massachusetts Acts manifest their discriminatory, protectionist purpose and effect. Both Senator Sullivan and Representative Onorato, the principal sponsors of the Connecticut Act, urged the adoption of the regional restriction provision in order to protect Connecticut banking institutions from competition by large out-of-state institutions, particularly those located in the nation's money centers, *i.e.*, New York, Illinois, Texas and California.[16] Similarly,

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[16] Senator Sullivan clearly articulated the Act's discriminatory, protectionist purpose:

> "[T]he main reason for this New England position is . . . to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking, . . . in order to give our banks in Connecticut time to merge and consolidate and purchase some of [*sic*] New England banks around and get as large as they possibly can so we can thwart any intervention as best we can from the large institutions. . . .
>
> * * *
>
> What we're trying to do here is to get our New England financial institutions in a position where they can withstand the assault of the big money markets . . . so that we can get the New England banks merged together and bought [*sic*] together so that they can . . . compete with the big money centers in New York and get stronger and stronger. . . ."

(footnote continued on following page)

according to its principal sponsor, State Senator John Brennan, the Massachusetts Act was specifically intended to exclude New York bank holding companies in order to give local companies "the space to grow" (Pet. App. A189).[17]

The geographic discrimination in both the Connecticut and Massachusetts Acts reflects the very essence of local parochialism and protectionism that the Commerce Clause prohibits. *See Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980) (citing *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538 (1949)); *Buck* v. *Kuykendall*, 267 U.S. 307, 315-16 (1925). Indeed, even if the New England Compact served objectives beyond local and regional protectionism, it could not withstand scrutiny under the *per se* test. In *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-24 (1978), this Court held that, regardless of the purpose of state legislation, such legislation is *per se* uncon-

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(footnote continued from preceding page)

Pet. App. A159-A160. Similarly, Representative Onorato openly acknowledged the parochial, protectionist goal of the Connecticut Act:

> "[I]f you want to talk about protecting the integrity of our own Connecticut home banks, what this bill does is gives Connecticut the lead time that it needs to go into the regional areas where they have something in common with other members.
>
> Give them a chance to grow and then they'll be in a position to compete."

Pet. App. A157.

[17] In summarizing a draft of the bill that eventually became the Massachusetts Act, the Research Staff of the Massachusetts House Committee on Banks and Banking noted that the purpose of the bill was:

> "to establish in the General Laws [of Massachusetts] the necessary authority for a regional, New England, banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority."

Pet. App. A150.

stitutional if its effect is to discriminate against interstate commerce.[18]

Moreover, the New England Compact is not the action of a single state, but rather is part of a more objectionable arrangement by a group of states to discriminate against their sister states and form an insular banking region. Thus, as the Board correctly recognized, the prohibitions of the Commerce Clause "are particularly applicable to state statutes that selectively confer benefits on one or more states and deny these same benefits to still other states" (Pet. App. A56).[19] Accordingly, regardless of any justification Massachusetts or Connecticut could attempt to offer for their statutes, the effect of those laws condemns them as *per se* violations of the Commerce Clause.

B. Under This Court's Decision in *Lewis* v. *BT Investment Managers, Inc.*, the New England Compact Cannot Be Justified as an Incidental Burden Necessitated by Legitimate Local Concerns

If, despite the patent discriminatory purpose and effect of the Massachusetts and Connecticut Acts, this Court were

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[18] "[T]he evil of protectionism can reside in legislative means as well as legislative ends. . . . [W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination." 437 U.S. at 626-27. *See also Toomer* v. *Witsell*, 334 U.S. 385, 404-06 (1948); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-24 (1935).

[19] *Accord Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939) ("The United States could not exist as a nation if each of them were to have the power . . . to discriminate as between neighboring states in admitting articles produced therein."); *Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891) ("[A state] . . . may not . . . make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States").

to apply the "balancing test" used to evaluate even-handed laws adopted for legitimate purposes under the Commerce Clause, analysis of the regional restriction provisions of those statutes would lead to the same conclusion of unconstitutionality. The immutable geographic discrimination established by these statutes cannot be justified by any asserted state objective.

In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court considered a Commerce Clause challenge to a Florida statute designed to prevent out-of-state banks, trust companies and bank holding companies from owning or controlling an investment advisory business in Florida. Identifying three interests Florida sought to promote through its legislation—regulating local financial practices, discouraging undue economic concentration, and maximizing local control over local financial activities—and without considering whether the statute was unconstitutional *per se*, this Court found that "the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." 447 U.S. at 42. The Court reasoned:

> "[W]e are not persuaded that these interests justify the heavily disproportionate burden this statute places on bank holding companies that operate principally outside the State. Appellant has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based. Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils. . . .

> With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition."

447 U.S. at 43-44 (citations and footnote omitted).

Here, as in *Lewis*, the interest in protecting local banks from large out-of-state banking institutions cannot justify the geographic discrimination mandated by the challenged legislation. Massachusetts and Connecticut have demonstrated absolutely no basis for inferring that all non-New England bank holding companies share the alleged evil of bigness. Nor is there any reason to conclude that this presumed evil is not shared by certain New England institutions that are just as large or larger than many non-New England banks.[20] Finally, the interests of Massachusetts and Connecticut in protecting local credit are not furthered by the New England Compact since there is nothing in their reciprocal statutes to guard against the depletion of these resources by distant New England institutions. "There is thus no reason to believe that the State's interest in local control, to the extent it legitimately exists, has been sig-

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[20] Yet, under the New England Compact, BBC, located in Massachusetts, is accorded the right to acquire Connecticut's Colonial while The Bank of New York, a holding company smaller than BBC, is denied the right to acquire Northeast, an institution approximately the same size as Colonial. *See* J. App. A25.

nificantly or evenhandedly advanced by the statutory means that have been employed." 447 U.S. at 44.[21]

C. The Court of Appeals Erred in Not Applying Either the *Per Se* or the Balancing Test to the New England Compact

The Court of Appeals did not discuss either the *per se* or the balancing tests; rather it observed that "in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The argument apparently is that since any state legislation allowing any interstate bank acquisition is, by definition, less burdensome than the total federal prohibition, the states are therefore free to impose whatever restrictions they might choose, no matter how discriminatory. However, neither logic nor Constitutional authority suggests that the ability of a state to permit commerce that otherwise would be federally prohibited is in any way equivalent to authority to discriminate geographically among sister states.

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[21] The New England Compact also violates the Commerce Clause prohibition against a state attempting to govern conduct outside of its own borders. For example, the Connecticut Act prohibits the acquisition of a Connecticut bank by a New England bank holding company (and, indeed, would require divestiture of such a bank acquired in a previously approved transaction) if the acquiring company or its parent owns or acquires any bank that has its main office or principal place of business outside of New England. As this Court recently said in *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982):

> "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.' "

457 U.S. at 643 (citation omitted). *See Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935); *United States Brewers Ass'n, Inc.* v. *Healy*, 692 F.2d 275, 279-80 (2d Cir. 1982), *aff'd*, — U.S. —, 104 S. Ct. 265 (1983).

This observation by the Court of Appeals also overlooks the critical notion of federalism embodied in the Commerce Clause. It is one thing for Congress to restrict interstate commerce, or expressly to authorize its restriction, but it is quite another for the states, lacking any express authority and relying upon Congressional silence, to arrogate this power to themselves. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 543 (1949) ("It is, of course, a quite different thing if Congress through its agents finds . . . restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity."). Any regional commerce purportedly fostered by restrictive state legislation is purchased at too high a price when that legislation constitutes blatant discrimination by a group of states against co-equal sister states that may be induced to retaliate. *See Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

D. The Douglas Amendment Does Not Establish That Congress Affirmatively Contemplated, and Unmistakably Intended to Remove From the Reach of the Commerce Clause, Othewise Invalid State Legislation

In the exercise of its plenary authority over interstate commerce, Congress may confer upon the states an ability to "restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44. *Accord Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981). Only last Term, however, this Court reiterated "that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, — U.S. —, —, 104 S. Ct. 2237, 2242 (1984). Without such a showing, a state may neither

discriminate against nor unduly burden interstate commerce. *See, e.g., Sporhase* v. *Nebraska,* 458 U.S. 941 (1982); *New England Power Co.* v. *New Hampshire,* 455 U.S. 331 (1982). In *Wunnicke* the Court reasoned:

> "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. . . . Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. . . . [W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."

— U.S. at —, 104 S. Ct. at 2242-43 (footnote omitted). In applying this principle, the Court has noted that "when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982) (citations omitted).

Although it did not explain its reasoning, the Court of Appeals indicated a belief that "by enacting the Douglas Amendment, the Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). However, the clear language of the Douglas Amendment and its legislative history demonstrate that such a construction is improper.

1. *The Statutory Language of the Douglas Amendment Does Not Unmistakably Authorize the New England Compact*

By its terms, the Douglas Amendment prohibits the Board from allowing out-of-state bank holding companies to acquire a bank in a state "unless the acquisition . . . of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located." As is readily apparent, the statutory language is completely silent regarding the form that a permissible state statute might take. While Congress obviously contemplated that some states might enact laws permitting interstate banking in the future, the language of the statute nowhere states, or even implies, that such state laws would not be subject to the Commerce Clause.

Indeed, this Court has already rejected the argument that the Douglas Amendment abrogates the negative implications of the Commerce Clause. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), Florida contended that its law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by the Douglas Amendment, section 3(d), and the savings clause, section 7, of the BHCA. Commenting specifically on the language of the Douglas Amendment, the Court unanimously stated:

> "[I]t is doubtful that § 3 (d) authorizes state restrictions of any nature on bank holding company activities. . . . The only authority granted to the States is the authority to create exceptions to this general [federal] prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

447 U.S. at 47 (emphasis in original). This Court noted that "[i]n contrast to § 3 (d), § 7 of the Act does reserve

to the States a general power to enact regulations applicable to bank holding companies," but found "nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation." 447 U.S. at 48-49. To the contrary, the Court found that "[f]ar from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an intent to forestall such a broad interpretation" and therefore held "that § 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause." 447 U.S. at 49.

Thus, as construed by this Court, the language of the Douglas Amendment, and the even broader language of section 7, fail to support the Court of Appeals' belief that the New England Compact has been authorized by Congress. Had Congress intended to allow states to create such a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 380 (1976) (quoting *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951)), it would have adopted statutory language that was unmistakably clear. It did not.

2. *Nothing in the Legislative History of the Douglas Amendment Unmistakably Authorizes the New England Compact*

The legislative history of the Douglas Amendment similarly provides no indication that Congress intended to allow the states to enact discriminatory statutes such as the Connecticut and Massachusetts Acts. The intent of Congress in enacting the BHCA was "to prevent the concentration of banking resources in the hands of a few financial giants

[and] to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity." *Lewis*, 447 U.S. at 46. The House was so hostile toward the spread of bank holding companies that it proposed an absolute prohibition on bank acquisitions across state lines. *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955). The attitude of the Senate was more tempered; it wanted to give the Board sole power to approve such acquisitions. *See* S. Rep. No. 1095, 84th Cong., 1st Sess. (1955).

The Douglas Amendment was offered to resolve this impasse. Senator Douglas agreed with the House that the expansion of bank holding companies was not in the public interest. He stressed that the immediate practical effect of his amendment would be to bar the expansion of bank holding companies across state lines. 102 Cong. Rec. 6860 (1956) (J. App. A15). Indeed, the Senator, as well as his supporters and opponents in Congress, shared the view that although technically the states would have the power to allow such expansion in the future, no state would choose to do so.[22] Not surprisingly, therefore, Congress did not even consider the manner in which a state might elect to permit interstate banking. As the United States Court of

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[22] For example, Senator Bricker stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." 102 Cong. Rec. 6861 (1956). Similarly, Senator Capehart declared that "under the proposed legislation we are pretty much freezing the banking system of America." *Id.* at 6934. And Senator Douglas said of his own amendment that "so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so." *Id.* at 6860. Finally, Representative Spence, the sponsor of the House bill, found no material difference between the BHCA, as amended by Senator Douglas, and the original House proposal, which would have totally prohibited interstate bank acquisitions. *Id.* at 7165.

Appeals for the District of Columbia Circuit stated in *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975): "Not once in the entire [Douglas Amendment] debate is the discrimination question raised."

3. *The Court of Appeals Misconstrued the Legislative History of the Douglas Amendment*

In concluding that by enacting the Douglas Amendment Congress endorsed the New England Compact, the Court of Appeals noted certain remarks by Senator Douglas during the floor debate. In particular, the court focused on (i) a comment concerning the ability of the states to permit the entry of out-of-state bank holding companies " 'only to the degree that State laws expressly permit them,' " and (ii) references that the Douglas Amendment paralleled McFadden Act provisions concerning the power of national banks to branch (Pet. App. A28 (quoting 102 Cong. Rec. 6858 (1956)). Rarely has so little been said to prove so much.

This Court has required an unmistakably clear expression of congressional intent in order to avoid judicial speculation as to what Congress "probably had in mind." *United States* v. *Public Utilities Commission*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). Yet, sheer speculation is what is required to convert Senator Douglas' "to the degree" comment into congressional authorization for the New England Compact's rending of our federal union. Such snippets of conversation simply "are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause, especially where the Supreme Court has required such explicit and clear authorization of discrimination by the Con-

gress because of the fundamental implications of such discrimination for the federal union" (BNE order, Pet. App. A67).[23] *See New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) ("Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards. . . .").

Furthermore, this fragment from the floor debate does not suggest that the Douglas Amendment allows states to distinguish among bank holding companies in any manner they choose. In referring to "them" generally (*i.e.*, to all "out-of-state bank holding companies"), Senator Douglas' statement, if anything, supports petitioners' view (as confirmed by the plain language of the statute) that the Douglas Amendment does not authorize discrimination among out-of-state bank holding companies in a manner that violates the Constitution. The Senator's use of the ambiguous phrase "to the degree" is best understood as referring to the number of states that ultimately would choose interstate banking, rather than the unknown and unknowable terms and conditions any future state statute might impose.[24]

Nor do Senator Douglas' references to the McFadden Act, 12 U.S.C. § 36, support the decision below. The McFadden

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[23] *Accord Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

[24] As the Board recognized, *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), cited by the Court of Appeals (Pet. App. A29-A30), "did not consider whether the alleged legislative authorization by the Douglas Amendment is express and unambiguous so as to sanction discrimination against interstate commerce that would otherwise run afoul of the Commerce Clause" (Pet. App. A69). *Iowa Bankers*, decided prior to this Court's decision in *Lewis*, involved neither the Commerce Clause nor the Compact Clause.

Act assures national banks "competitive equality" with "State banks" by giving them the identical ability to branch within a particular state. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Interstate branching was simply not an issue when Congress enacted the McFadden Act. The language of the Douglas Amendment insures that federally-chartered and state-chartered banks are treated equally by banning all interstate bank acquisitions, as a matter of federal law, and then conditioning the lifting of the ban on a state statute authorizing "the acquisition of . . . a State bank." [25] In this way, and only in this way, are the Douglas Amendment and the McFadden Act parallel.

In contrast to the New England Compact, Congress has not, either in the McFadden Act or the Douglas Amendment, given preferred status to some states or groups of states while relegating others to the status of boycott targets, nor has it authorized a state to govern the conduct of banks in another state.[26] And even if the Massachusetts and Connecticut Acts had paralleled federal law in this area, the requisite congressional consent would not be established: "The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy

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[25] As the House Report on the BHCA recognized, "[t]here is no constitutional basis by which a State could prohibit a corporation chartered in another State from owning or controlling a national bank located within its borders." H.R. Rep. No. 609, 84th Cong., 1st Sess. 7 (1955).

[26] *See* Golembe Aff. ¶¶ 10-29 (Ct. App. JA 333-47); *see also* Fisher & Golembe, *The Branch Banking Provisions of the McFadden Act as amended, reprinted in* Compendium of Issues Relating to Branching by Financial Institutions, Subcomm. on Financial Institutions of the Sen. Banking Comm., 94th Cong., 2d Sess. 21 (1976) ("To say that [the McFadden Act] was meant to give the states control over Federal branching policy is to misread more than a century of national bank legislative and judicial history.").

furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." *South-Central Timber Development, Inc.* v. *Wunnicke*, — U.S. —, —, 104 S. Ct. 2237, 2243 (1984). Accordingly, the McFadden Act, limited as it is to state boundaries, and grounded as it is in a concern for equality, cannot be used to construe the Douglas Amendment as authorization for the divisive state laws under review here.[27]

4. *The Court of Appeals Erred in Deferring to the Board's Incorrect and Unsupported View That the Douglas Amendment Renounces All Federal Interest in Interstate Acquisitions*

The Court of Appeals apparently considered itself bound by the Board's conclusion that the Douglas Amendment renounces all federal interest in interstate banking in favor of the states and thus shields the New England Compact from constitutional attack. This deference was surprising since the Board expressed uncertainty over this conclusion (Pet. App. A61-A71) and declined to defend its interpretation of the statute in the Court of Appeals, stating that the "legal issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes remains for this Court to resolve" (App. Br. at 19). The Court of Appeals simply failed to grasp the concern ex-

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[27] Nor would it be proper to imply consent to discriminatory state legislation from the Douglas Amendment's federal ban. This would require "mere speculation" about what Congress "probably had in mind" and would significantly undermine the Commerce Clause protection of unrepresented interests from parochial discrimination. This Court's requirement of unmistakable clarity assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views. To imply congressional approval of discriminatory state legislation would deny national representatives of the burdened interests their voice and would instead give the initiative to state legislatures. *See Wunnicke*, — U.S. at —, 104 S. Ct. at 2242-43.

pressed by this Court, and shared by the Board, that "[j]udicial deference to an agency's interpretation of a statute 'only sets "the framework for judicial analysis; it does not displace it."'" *Securities Industry Association* v. *Board of Governors,* — U.S. —, —, 104 S. Ct. 2979, 2983 (1984) (citations omitted). The Board itself acknowledged that its stringent "clear and unequivocal" standard of review is designed, in part, to preserve "the historic role of the judicial branch of government in balancing state and federal interests in construing the scope of the constitutional powers of the states" (Pet. App. A40). The Court of Appeals thus erred in deferring to the Board on this issue.

Construing the Douglas Amendment as a renunciation of all federal interests rests on the curious notion that in 1956 Congress, without considering even the possibility of discriminatory state statutes or compacts, and without explicitly addressing that point, intended to authorize any future deviation from the federal norm, no matter what form it took. It is inconceivable that congressional representatives from New York, Texas or California would not have voiced objections to legislation authorizing concerted boycotts against their states.

Properly understood, the Douglas Amendment bans interstate banking and then, as a matter of federal law, permits each state to determine whether interstate banking is consonant with that state's interests. Such deference to a state legislature's determination to permit interstate banking in no way authorizes discriminatory state legislation. In *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982), the claim was made that by reference to some thirty-seven federal enactments and several congressionally approved interstate compacts, this Court should conclude that Congress had authorized the states to burden interstate commerce by enacting reciprocal ground water regulations. The Court rejected this argu-

ment, holding that although Congress had indicated its deference to state water laws, there was no indication that Congress "wished to remove federal constitutional constraints on such state laws." 458 U.S. at 960. Thus, "[t]he negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." 458 U.S. at 960 (emphasis in original). The same result obtains here, and the New England Compact is consequently constitutionally infirm.[28]

II

THE NEW ENGLAND COMPACT VIOLATES THE COMPACT CLAUSE

Article I, § 10, cl. 3 of the United States Constitution provides that:

> No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . .

In recognition of the critical federalism concerns embodied in the Compact Clause, this Court has stated that congressional approval is required for any manner of interstate agreement that (i) injures sister states, or (ii) otherwise encroaches upon federal authority. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978).[29]

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[28] The Court of Appeals erroneously concluded that this construction of the Douglas Amendment would present the states with an "all-or-nothing" choice as to interstate bank acquisitions. Under this Court's decision in *Lewis,* the states remain free to enact regulations applicable to bank holding companies so long as that power is exercised "within the boundaries marked by the Commerce Clause" and is not inconsistent with federal law. 447 U.S. at 48-49. The choice, therefore, is between no interstate acquisitions and a statute that comports with the Commerce Clause.

[29] The debates at the Constitutional Convention vehemently denounced "partial confederations" and regional "combinations" of

(footnote continued on following page)

Even a "potential, rather than actual, impact on federal supremacy," 434 U.S. at 472, invokes the Compact Clause requirement of congressional consent. Having both an actual and a potential adverse impact on sister states and the federal structure, and lacking congressional consent, the New England Compact is unconstitutional.

A. The Reciprocal Nature of the Massachusetts and Connecticut Statutes Compels This Court to Consider Whether the New England Compact Requires Congressional Consent

This Court has held that where two or more state statutes are reciprocal in nature, that fact alone mandates an inquiry as to whether the interstate arrangement intrudes upon the concerns embodied in the Compact Clause. In *Multistate Tax Commission,* the Court declared:

> "Agreements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.' Mr. Chief Justice Taney considered this point in *Holmes* v. *Jennison,* 14 Pet., at 573:
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> > 'Can it be supposed, that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an

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(footnote continued from preceding page)

states aimed at restricting the commerce of other states. *See, e.g., Madison, Debates in the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of the American States,* H. Doc. No. 398, 69th Cong., 1st Sess. 584, 587 (1927) ("it seems to be feared that the Northern States will oppress the trade of the south. . . . The Middle States may apprehend . . . combinations against them between the Eastern & Southern States"); *id.* at 634 ("different interests" of the North, South, East and West would lead to "oppressive regulations" of commerce).

> evasion of the constitution to place the question upon the formality with which the agreement is made.' "

434 U.S. at 470 (footnote omitted). Regardless of the form of the agreement, the relevant inquiry must be whether the regional schemes of two or more states result in an "impact on our federal structure." 434 U.S. at 471.

Any suggestion that Connecticut, Massachusetts and Rhode Island adopted their statutes unilaterally does not comport with reality. Within a period of less than a year, these New England states enacted reciprocal statutes imposing identical geographic limitations on entry by out-of-state bank holding companies into their respective states. It was only by coordinating their efforts that these states could ensure that regional banking would be established, uniform barriers to entry by outside companies would be raised, and the ultimate purpose of the Compact—to insulate New England companies from competition with non-New England firms—would be realized.

The Board's findings confirm that the Connecticut and Massachusetts Acts were concerted actions resulting from careful planning and discussions between the states:

> "Passage of the acts was preceded during a four-month period by a formal meeting of representatives of the New England states to discuss regional interstate banking, by the formation of a New England Committee to Study and Promote Regional Interstate Banking, by testimony of legislators at hearings on the issue before legislative committees in other New England states, and by apparent review and comments on the proposed Connecticut legislation by the Massachusetts Banking Department."

BNE order, Pet. App. A51.

B. The New England Compact Is Precisely the Kind of Interstate Agreement That the Compact Clause Was Designed to Regulate

The New England Compact is precisely the type of compact that, in the absence of congressional consent, is proscribed by the Constitution. Although this Court has upheld certain compacts that do not carry with them any congressional endorsement, those compacts all reflect efforts to harmonize, rather than disrupt, interstate relations.[30]

This is the first case squarely raising the issue whether a compact posing a direct affront to the sovereignty of sister states is void without congressional consent. The New England Compact is radically different in purpose and effect from the agreements that have been upheld by this Court in that, instead of promoting cooperation, the discriminatory New England Compact both: (i) benefits New England states at the expense of all other states; and (ii) affects a matter of significant national concern by interfering with and disrupting federal regulation of interstate banking.

1. *The New England Compact Benefits the Compacting States at the Expense of Excluded States and Deranges the Relations Among the States of the Union*

This Court has consistently recognized that the Compact Clause was designed to prevent groups of states from increasing their power at the expense of sister states and

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[30] Examples of such compacts for which congressional consent is not required include the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, referred to in *New York* v. *O'Neill*, 359 U.S. 1, 3, 11 (1959) (the Constitution does not preclude states from adopting "reciprocal, voluntary legislation . . . to accomplish fruitful and unprohibited ends"); the Multistate Tax Commission at issue in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978); the Interstate Compact on Mental Health and the Colorado River Compact of 1921 (as described in F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* (1976)).

thereby undermining our federal structure. For example, in *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657, 724 (1838), the Court stated that "in giving to congress the power of dissenting to compacts" the Constitution intended "to guard against the derangement of [a state's] federal relations with the other states of the Union." In *Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 493-94 (1855), the Court observed that:

> "By the 10th section of the 1st article of the constitution, no state can enter into any agreement or compact with another state, without the consent of congress. . . . This provision is obviously intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states, which might affect injuriously the interests of the others. And the right and the duty to protect these interests is vested in the general government."

The same rationale was employed recently by this Court in *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978). While the majority and dissenting opinions disagreed about the proper application of Compact Clause principles to the facts of that particular case, there was unanimous agreement that a multistate compact would require congressional approval if it disturbed relations among sister states.

The majority considered the question whether the multistate tax compact would "redound to the benefit of any particular group of States or to the harm of others," and concluded that it would not. 434 U.S. at 477. Justice White's dissenting opinion in *Multistate Tax Commission* also emphasized that a compact that impairs the interests

of sister states is forbidden unless explicitly approved by Congress.

> "There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority, nor is that surprising in view of the Federal Government's pre-eminent purpose to protect the rights of one State against another. If the effect of a compact were to put non-compact States at a serious disadvantage, the federal interest would thereby be affected as well."

434 U.S. at 494-95.[31]

By its very nature, the New England Compact is intended to, and does, benefit the member states to the detriment of the forty-four excluded states. Indeed, the exclusion of non-New England states, and the aggrandizement of the member states, is the essence of the New England Compact.

The purpose and effect of the New England Compact are fundamentally different from those of the interstate agreement upheld in *Multistate Tax Commission*. Three critical points distinguish the *Multistate Tax Commission* compact from the one involved here.

First, membership in the Multistate Tax Commission was open to all states on a uniform basis. The New England

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[31] *See also Cuyler* v. *Adams*, 449 U.S. 433, 451 (1981) (Rehnquist, J., dissenting on other grounds) (noting that to fall within the purview of the Compact Clause, a compact must encroach on federal supremacy or "elevate member States at the expense of nonmembers"); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893); F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1976); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1925).

Compact is restricted to six states, with no avenue available to excluded states to avoid the diminution of sovereign interests. Second, the Court in *Multistate Tax Commission* found that the risk of harm inflicted upon non-member states was "independent of the Compact," since the individual states could have inflicted the identical harm on the appellants without entering into an agreement. 434 U.S. at 478. In contrast, the competitive advantages to be secured by an exclusionary banking region can only be realized by means of an arrangement among the states located within the region. Third, the *Multistate Tax Commission* compact was designed to help states act in a coordinated manner in taxing the income of interstate businesses, and involved nothing that would "redound to the benefit of any particular group of States or to the harm of others." 434 U.S. at 477. Markedly different is the New England Compact, which is specifically intended to augment regional power at the expense of all excluded states.

No constitutional precept may be cited that would shield a regional compact having direct, adverse effects on sister states from the requirement of congressional scrutiny. Under the analysis employed by the entire Court in *Multistate Tax Commission,* this fact alone renders the New England Compact invalid.

2. *The New England Compact Encroaches Upon the Exercise of Federal Authority*

The New England Compact's overt purpose and effect of increasing the power of member states at the expense of all other states has a serious adverse impact upon our federal structure. It poses an additional challenge to federal authority because it has the potential for encroaching upon federal banking laws.

The New England Compact conflicts with the federal policy articulated in 12 U.S.C. § 1823(f), part of the recently enacted Garn-St Germain Depository Institutions Act of 1982. That statute contemplates that the Federal Deposit Insurance Corporation ("FDIC") will arrange acquisitions of failing or failed banking institutions by out-of-state bank holding companies, where in-state alternatives are unavailable or unsatisfactory. The Massachusetts and Connecticut Acts, however, prohibit Massachusetts and Connecticut banks and bank holding companies from acquiring non-New England banks (Pet. App. A99, A101-A102), and thereby prevent the FDIC from looking toward Massachusetts and Connecticut banking institutions to save failing or failed non-New England banks.

Peculiar to the Connecticut Act, moreover, is the inhibiting effect it has on the FDIC's responsibility even to solicit bids for failing or failed non-New England banks from bank holding companies located in other New England states (*e.g.*, Massachusetts) that control or desire to control a Connecticut bank. This is because such a company would be required to divest itself of its Connecticut banks, or would be prohibited from making such an acquisition, if it acquired a non-New England Bank (Pet. App. A99). The Connecticut Act, and the New England Compact of which it is part, thus conflict with the paramount federal policy providing for the interstate acquisition of failing or failed banks, and accordingly violate the Compact Clause.[32]

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[32] It cannot be argued that because the Garn-St Germain Act, by its terms, sought to supersede "any other provision of law, State or Federal," 12 U.S.C. § 1823(f)(4)(i), there is no encroachment upon federal authority under the Compact Clause. Supreme federal interests are impaired, if the effect of state action "is to discourage conduct that federal action seeks to encourage." L. Tribe, *American*

(footnote continued on following page)

C. The Douglas Amendment Does Not Constitute Congressional Consent to Regionally Restrictive Interstate Banking Compacts

The foregoing discussion, *see* pp. 20-30, *supra,* leaves no doubt that Congress in enacting the Douglas Amendment has never authorized restrictive regional interstate banking. Even if the Douglas Amendment may be construed as constituting congressional consent to individual states to burden interstate commerce, it does not follow that by this action Congress has approved the coordinated action of several states to carve out for themselves a separate banking zone.

The different standards of congressional authorization for the Commerce and Compact Clauses can be explained by the very language of the Constitution. The Commerce Clause bestows a particular power upon Congress; the limitation on the power of the states to erect barriers against interstate trade is a judicial, albeit a logical, implication from the congressional power. By contrast, the language of the Compact Clause leaves little room for debate on what constitutes congressional consent. It provides an absolute prohibition against interstate compacts "without the Consent of Congress." Such explicit language, when analyzed under the lens of the Clause's history, compels the conclusion that congressional approval of an interstate compact must be made explicitly and with full knowledge of its ramifications.

(footnote continued from preceding page)

Constitutional Law 378 (1978); *see, e.g., Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 239 (1967). There is no question but that the New England Compact on its face discourages the federal policy embodied in the Garn-St Germain Act. Under the analysis employed in Compact Clause cases, this encroachment upon a paramount federal interest requires that the compact be struck down absent Congressional approval.

Neither the language of the Douglas Amendment nor the debates prior to its enactment, contemplate coordinated state action to create a banking region to the detriment of excluded states. The Douglas Amendment speaks solely of a single host "State," not a group of states. This Court has said that, when Congress refers to control by a single state, "the language has no relation to possible joint control by two or more States under the compact clause of the Constitution." *United States* v. *Public Utilities Commission*, 345 U.S. 295, 309 n.16 (1953) (quoting *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F.2d 179, 187 (3d Cir. 1949)). Thus, there can be no argument that the Douglas Amendment authorizes groups of states to band together in restrictive interstate banking compacts.

There is likewise no substance under the Compact Clause to the argument that the Douglas Amendment represents a "renunciation of federal interest." This argument required the Court of Appeals to maintain that, while Congress has never considered and approved discriminatory regional banking compacts, [33] the language of the Douglas Amendment constitutes advance consent for states to form any manner of discriminatory banking combination they choose. Such a view completely eviscerates the Compact Clause's requirement of congressional consent and is belied by Congress' "renewed interest" in interstate banking in 1982, when it amended the Douglas Amendment to conform that statute to the failing bank provisions of the Garn-St German Act.[34]

---

[33] Even the proponents of regional banking would concede that Congressional authorization for such activity is lacking, since they have lobbied unsuccessfully for such legislation in the last two years.

[34] Congress in 1982 amended the Douglas Amendment to exempt from its proscription against interstate banking any "application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act."

The renunciation theory embraced by the Court of Appeals also ignores the practical reality of how Congress approves compacts. As the Chairman of the House Committee on the Judiciary has observed:

> "Typically, compacts are negotiated and agreed to by the States and then submitted to Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences."

Pet. Reply Brief App. A2. Neither procedure was followed here.

Finally, the Court of Appeals erred in its analysis of congressional authorization under the Compact Clause by concluding that "if at any time Congress should find any encroachment [on the part of the compact], it could remove the encroachment by appropriate legislation" (Pet. App. A32). This theory would authorize any compact—no matter how pernicious—simply because Congress could later invalidate it. That is not the law. The Constitution gives Congress the initiative in controlling regional arrangements—it does not, contrary to the Court of Appeals, relegate Congress to the more passive role of acting after the fact.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that the judgment of the Court of Appeals be reversed and that the Connecticut and Massachusetts Acts be declared unconstitutional.

Respectfully submitted,

GEORGE D. REYCRAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000

Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:

JOHN BOYER
JEFFREY Q. SMITH
GREGORY SCOTT MERTZ
JOSEPH POLIZZOTTO
ALYSE GRAY

CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038

DANIEL GLASSBERG
Corporate Counsel
637 West Avenue
Norwalk, Connecticut 06850
(203) 838-4341

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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR PETITIONER CITICORP

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153

ROBERT L. STERN
STEPHEN M. SHAPIRO

MAYER, BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604

February 21, 1985

Questions Presented

1. Has Congress authorized confederations of states to create interstate banking regions through multi-state compacts that permit full service banking within the region by bank holding companies located in those states, but boycott the bank holding companies located in states outside the region?

2. Absent authorization by Congress, does such balkanization of interstate banking through regional compacts violate the Commerce Clause or the Compact Clause of the Constitution?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. The Rule 28.1 listing of petitioners' parent companies, subsidiaries and affiliates appears at Pet. App. A1-A20.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-363

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

— against —

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF FOR PETITIONER CITICORP

Opinions Below

The opinion of the Court of Appeals is reported at 740 F.2d 203 and is reproduced at Pet. App. A21-A33. The judgment of the Court of Appeals is reproduced at J. App. A3-A4. The order of the Board of Governors of the Federal Reserve System (the "Board") approving the merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT") is reported at 70 Fed. Res. Bull. 374 (1984) (Pet. App. A34-A71); the Board's order approv-

ing the acquisition by Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru") is reported at 70 Fed. Res. Bull. 353 (1984) (Pet. App. A72-A78); and the Board's order approving the acquisition by Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial") is reported at 70 Fed. Res. Bull. 524 (1984) (Pet. App. A79-A86).

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1984. The petition for a writ of certiorari was timely filed on September 6, 1984, and was granted on January 7, 1985. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause (Art. I, § 8, Cl. 3) and the Compact Clause (Art. I, § 10, Cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Connecticut statute, 1983 Conn. Act 83-411 (Reg. Sess.); and a Massachusetts statute, Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984). These constitutional and statutory provisions are reproduced at Pet. App. A95-A102.

Statement of the Case

At issue in this case is the constitutionality of reciprocal Massachusetts and Connecticut statutes that form an interstate compact that permits local bank holding companies to offer full banking services throughout a multi-state region but precludes companies from other states from offering such services within the region. Petitioners contend that these laws, and the interstate compact of which they are a part, violate both the Commerce Clause and the Compact Clause of the Constitution, which forbid groups of states to join together to injure their sister states or impinge on federal authority without unmistakable Congressional authorization.

1. *Petitioners.* Petitioner Northeast Bancorp, Inc. ("Northeast") is a bank holding company organized under Connecticut law. Its wholly-owned subsidiary, petitioner Union Trust Company ("Union Trust"), is a Connecticut bank that competes directly with banks owned by respondents CBT, HNC and Colonial, among others. On August 3, 1983, Bank of New York Corporation, a New York bank holding company, agreed to acquire the stock of Northeast subject to Board approval and passage of enabling legislation by the State of Connecticut or the federal government.

Petitioner Citicorp is a bank holding company with its principal place of business in New York. Through its bank and non-bank subsidiaries, Citicorp offers a variety of financial services to consumers and businesses in New York, New England and elsewhere in the country (Pet. App. A224-A225). However, by virtue of the regional restriction provisions of the challenged statutes, Citicorp and other non-New England bank holding companies are barred from controlling a Connecticut or Massachusetts bank.

2. *The Bank Holding Company Act.* In 1956 Congress enacted the Bank Holding Company Act (the "BHCA"), 12 U.S.C. §§ 1841 *et seq.*, which provides, *inter alia*, that a bank holding company[1] may not acquire a bank[2] unless the transaction has been approved by the Federal Reserve Board pursuant to specified competitive, financial and other standards. *See* U.S.C. § 1842(a). Section 3(d) of the BHCA (the "Douglas Amendment") prohibits the Board from approving any acquisition of a bank located in one state by a bank holding company with its principal place of operations in another state, unless:

> "the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

---

1. A "bank holding company" is defined, for purposes of the BHCA, as a company that controls any bank or bank holding company. *See* 12 U.S.C. § 1841(a)(1).

2. In relevant part, 12 U.S.C. § 1841(c) defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

For sixteen years following passage of the Douglas Amendment, no state enacted a statute authorizing interstate bank acquisitions. Since 1972, several states have enacted such laws (Pet. App. A69-A70), but none of the legislation passed prior to December 1982 incorporated geographically discriminatory criteria.

3. *The New England Compact.* On December 30, 1982, Massachusetts enacted the nation's first regionally restrictive interstate banking statute (the "Massachusetts Act").[3] This law authorizes an out-of-state bank holding company to acquire control of a Massachusetts bank if:

1. the home state of the acquiring bank holding company grants reciprocal rights to Massachusetts bank holding companies (the "reciprocity provision"); and

2. the acquiring bank holding company has its principal place of business in Connecticut, Maine, Vermont, New Hampshire or Rhode Island and is not owned by a company with its principal place of business outside of those states or Massachusetts ("New England") (the "regional restriction provision").

According to its principal sponsor, State Senator John Brennan, the Massachusetts Act was specifically intended to exclude money center bank holding companies located in states such as New York, in order to give local companies "the space to grow" (Pet. App. A189). He explained that: "I just didn't think it would be good for the state if the big money center banks came in here" (Pet. App. A189). In summarizing a draft of the bill that eventually became the Massachusetts Act, the Research Staff of the Massachusetts House Committee on Banks and Banking noted that the purpose of the bill was:

> "to establish in the General Laws [of Massachusetts] the necessary authority for a regional, New England,

3. Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (Pet. App. A101-A102).

banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority'' (Pet. App. A150).

To obtain reciprocal legislation in other New England states, Senator Brennan convoked a meeting of bankers, regulators, and legislators from the New England states in February 1983, and embarked upon a campaign to convince other New England states to ''join the Massachusetts plan and set up a real New England system'' (Pet. App. A189, A162-A168). The participants in this meeting then formed the New England Committee to Study and Promote Regional Interstate Banking, which included legislators from each of the New England states (Pet. App. A51, A161).

Senator Brennan also testified before the Connecticut Legislature that he strongly recommended ''adoption of a regional approach to interstate banking.'' He added that the bill which Connecticut ultimately enacted (the ''Connecticut Act'') bore a ''remarkable similarity to the Massachusetts [Act] . . . [and] would be a very very good companion to the Massachusetts concept'' (Pet. App. A154).[4]

Senator Brennan and his followers were successful in their efforts to obtain additional state regional banking statutes. On June 8, 1983, Connecticut enacted banking legislation with reciprocity and regional restriction provisions modeled on the Massachusetts Act.[5] The legislative history of the Connecticut Act manifests in even greater detail the same concerted, exclusionary purpose as that of the Massachusetts Act.[6] Connecticut legislators specifically referred to the ''New York banks'' and the

4. *See also* Conn. Sen. Debate at 70 (Sen. Sullivan) (Pet. App. A160); Conn. House Debate at 269 (Rep. Onorato) (Ct. App. JA833).

5. 1983 Conn. Act. 83-411 (Reg. Sess.) (Pet. App. A97-A100).

6. *See, e.g.*, Conn. Sen. Debate (Sen. Sullivan) (Pet. App. A159-A160); Conn. House Debate (Rep. Onorato) (Pet. App. A157-A158).

"fear that they would come into Connecticut." Those legislators sought to give "our banks in Connecticut" the chance "to merge and consolidate and purchase some of the New England banks" without competition from companies based in New York (Pet. App. A159-A160). On May 17, 1983, Rhode Island enacted similar reciprocal regionally restrictive legislation (the "Rhode Island Act").[7]

4. *The Spread Of State-Created Exclusionary Banking Regions.* The "New England Compact" formed by the Massachusetts, Connecticut and Rhode Island Acts is serving as the prototype for regionally restrictive interstate compacts that are spreading across the nation. As the Federal Reserve Board observed, "no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country" (Pet. App. A37). In the map set forth on the following page, the Federal Reserve Bank of Boston graphically depicted these burgeoning banking zones—all of which exclude the principal boycotted money-center states, New York, Texas and California. This balkanizing process is proceeding apace: since the Board's March 1984 orders were issued, Florida, North Carolina, South Carolina and Utah all have enacted additional regionally restrictive banking statutes, and Georgia, Florida, North Carolina and South Carolina have established a Southeast banking region (Pet. App. A232, A244-A245).

Under these regionally restrictive banking statutes, bank holding companies from favored states would be able to consolidate and control full service banks on an interstate basis, thereby increasing their capital bases, attractiveness to customers and general competitive positions (Pet. App. A234-A237). In contrast, companies from disfavored states would be unable to provide full banking services anywhere within the exclusionary regions created by such statutes (Pet. App. A227).

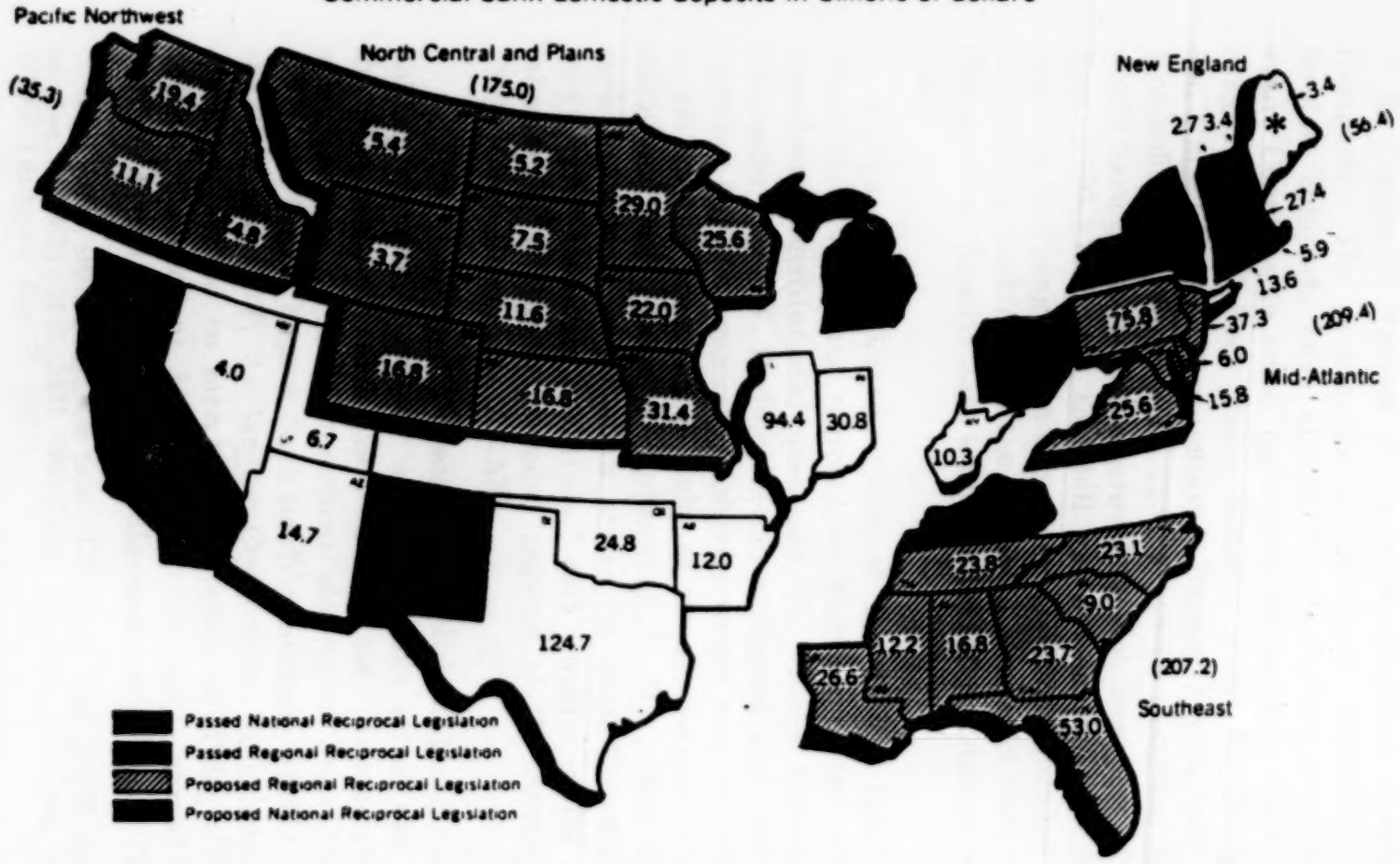
---

7. R.I. Pub. Law S. 0661 Sub. A (Pet. App. A103-A106). The regional restriction provision of the Rhode Island Act expires on July 1, 1986.

BEST AVAILABLE COPY

Proposed Interstate Banking Regions

Commercial bank domestic deposits in billions of dollars



*Maine passed a law in July 1975 allowing interstate banking with a reciprocal provision but that provision was rescinded on February 7, 1984.

Note: Alaska passed legislation in 1982 which allows interstate banking through holding companies on a national basis with no provisions for reciprocity. Georgia's legislature on February 13, 1984 passed a regional reciprocal interstate banking bill which is awaiting the governor's approval. Rhode Island's law provides for reciprocity in New England on July 1, 1984 and reciprocity in the nation to go into effect on July 1, 1986. This map only includes proposed interstate banking regions announced through mid-March 1984. Banking groups, state legislatures and other interested parties proposed these regions but they are not definitive. In fact, new ones are constantly being considered and proposed. Regional domestic deposits are shown in parentheses.

Source: Domestic deposit data as of June 30, 1983; Report of Condition Tape, FRS, FDIC, Comptroller of the Currency.

5. *Congress' Refusal To Approve Regional Banking Compacts.* The proponents of regionally restrictive interstate compacts have attempted unsuccessfully to persuade Congress to enact legislation authorizing their arrangements. United States Senator Paul E. Tsongas and United States Representative Barney Frank, both of Massachusetts, jointly sponsored a bill in Congress that would have given federal approval to such compacts (Pet. App. A190-A191),[8] but that bill was not enacted. A provision authorizing regional banking also was included in an omnibus banking bill, the proposed Financial Services Competitive Equity Act, which failed of enactment last year.[9]

At that time, the Chairman of the House Banking Committee noted that regional banking compacts "raise significant constitutional questions."[10] House Judiciary Chairman Peter W. Rodino further explained that, before enacting any such measure, Congress would need carefully to review the proposal, in light of its unresolved "Constitutional and economic implications." He added that such legislation would allow states to align themselves into "rival economic coalitions" and would "invite retaliation by States in excluded regions of the country" (Pet. Reply Brief App. A2-A3).

6. *The Challenged Transactions.* New England bank holding companies quickly sought to take advantage of the Massachusetts and Connecticut Acts. Immediately after passage of the Connecticut statute in June 1983, BNE, the fourth largest bank holding company in Massachusetts, and CBT, the largest Connecticut bank holding company, agreed to merge. In September 1983, HNC, another Connecticut bank holding company, agreed to acquire Arltru, the owner of a Massachusetts bank. And

8. S. 1002, 98th Cong., 1st Sess., 129 Cong. Rec. S4259 (daily ed. Apr. 7, 1983); H.R. 2431, 98th Cong., 1st Sess., 129 Cong. Rec. H1861 (daily ed. Apr. 7, 1983).

9. *See* S. 2851, 98th Cong., 2d Sess. § 903(2), 130 Cong. Rec. S11,178 (daily ed. Sept. 13, 1984).

10. 130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984) (Rep. St Germain).

in November 1983, BBC, a Massachusetts bank holding company and the largest such company in New England, agreed to acquire Colonial, the owner of a Connecticut bank.

7. *The Decision Of The Federal Reserve Board.* In their applications to the Board for approval of their respective consolidations, BNE, CBT, HNC and BBC contended that the Connecticut and Massachusetts Acts authorized the Board to approve their transactions under the Douglas Amendment. As interested parties that would be directly injured by consummation of the proposed transactions,[11] petitioners contended that these statutes violate the Commerce Clause and the Compact Clause, and therefore cannot serve as an exception to the Douglas Amendment's general prohibition against interstate banking.[12] Thus, petitioners contended that the Board lacked authority to approve these consolidations.[13]

On March 26, 1984, the Board approved the BNE-CBT application. It conceded a lack of expertise concerning the constitutional issues rasied in this case, and stated that it would approve the challenged transaction unless it found the Connecticut statute to be "clear[ly] and unequivocal[ly]" unconstitutional (Pet. App. A41). Relying on a detailed staff analysis (Pet. App. A49-A71) that was "made a part of the Board's findings" (Pet. App. A41 n.15, the Board found that this stringent standard of

11. *See* 12 U.S.C. § 1850; Pet. App. A38 n.6; Pet. App. A233-A237.

12. Citicorp challenged each of these applications before the Board. Northeast and Union Trust challenged the BNE-CBT application. Since the Board's approval of the orders challenged in this case, the Board has approved five additional transactions, each of which has been challenged by Citicorp.

13. The Board may not approve an acquisition predicated on unconstitutional state legislation. *See Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965); *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1293 n.4 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975); Pet. App. A39-A40.

review had not been met, and therefore approved the transaction.

Nevertheless, the Board's specific findings directly support petitioners' contention that the Massachusetts and Connecticut Acts are unconstitutional. Noting that "[t]he discriminatory nature of [the Connecticut Act] is apparent from its legislative history" (Pet. App. A58), the Board found that the regionally restrictive Connecticut Act was enacted for purposes of economic protectionism (Pet. App. A57-A60). It also found that, absent Congressional authorization, "[the Connecticut Act] imposes a burden on interstate commerce of the type that would be found by the courts to violate the Commerce Clause." *Id.* The Board explained that this discrimination was suspect because these statutes are not the product of unilateral conduct, but instead constitute an interstate arrangement that "can be considered to be part of an implicit compact or agreement" (Pet. App. A51-A52).

Although the Board believed that the Douglas Amendment implicitly authorized the challenged state laws, it acknowledged that "the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states . . . but against all other states" (emphasis in original). The Board also admitted that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court" in past Commerce Clause cases (Pet. App. A65). Finally, after reviewing the legislative history, the Board found "no discussion of the power to discriminate among potential out-of-state entrants" (Pet. App. A66).[14]

Given these findings, it is not surprising that the Board recognized that its tentative resolution of the "fundamental and unique constitutional issues" inherent in dis-

14. The Board subsequently approved the HNC-Arltru and BBC-Colonial acquisitions on the basis of the discussion in its BNE-CBT Order, applying the same analysis to the Massachusetts Act that it employed with regard to the Connecticut Act (Pet. App. A75, A84).

criminatory multi-state arrangements such as the New England Compact was "not free from doubt" (Pet. App. A41, A83). As Board Chairman Paul A. Volcker later advised Congress, the Board acted simply upon an "assumption of constitutionality" when it approved the applications (Pet. App. A197); and, according to Chairman Volcker, the Board perceives "serious questions both about the constitutionality of such arrangements and their implications for public policy" (Pet. App. A199).

8. *The Decision Of The Court of Appeals.* Petitioners filed petitions for review of the Board's orders pursuant to 12 U.S.C. § 1848,[15] and the Court of Appeals affirmed. Despite the Board's uncertainty about the issues in this case, the court accorded "substantial deference" to the Board's opinion, placing principal reliance on the Board's observation that the Douglas Amendment constitutes a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies" (Pet. App. A29).

With regard to the Commerce Clause, the court asserted that because the Douglas Amendment imposes a federal ban on interstate bank acquisitions, "the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The Court also stated its belief that "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31).

Concerning the Compact Clause, the court agreed with the Board's finding that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because the court did

15. Citicorp filed a petition for review of each of the challenged Board orders. Northeast and Union Trust filed a petition for review of the Board's BNE-CBT order, and were granted the right to intervene in the appeal from the HNC-Arltru order (Pet. App. A94). The Second Circuit subsequently consolidated the BBC-Colonial appeal with the appeal from the other two orders.

"not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States. However, if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation" (Pet. App. A32).

Summary of Argument

1. *The Douglas Amendment.* As both the Board and the Solicitor General have recognized, the Connecticut and Massachusetts Acts are unconstitutional in the absence of Congressional authorization (Pet. App. A52, A58; Board Br. in Opp. 5). They are openly protectionist statutes that form an interstate compact that intentionally discriminates against commerce from excluded states and impairs federal authority over interstate banking.

Because of the threat to the federal union posed by such discriminatory and divisive state laws, this Court has held similar laws unconstitutional unless their proponents can demonstrate that Congress—the forum in which representatives from all affected states can be heard—has specifically considered and approved the particular discrimination at issue. Consent may not be found under the Commerce Clause unless it is "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S. Ct. 2237, 2242 (1984). Likewise, a discriminatory multi-state compact cannot escape the prohibition of the Compact Clause absent an unmistakable manifestation of deliberate and specific Congressional approval of such an agreement.

Respondents attempt to meet their burden of proof by reference to the Douglas Amendment and to certain ambiguous language in the legislative history. However, respondents cannot even agree among themselves on where the purported authorization is to be found in the statute and its history. Their inability to agree on the source of the supposed authorization is a striking demonstration

of the absence of "unmistakable evidence" of Congressional consent.

As the Board explained, "the Douglas Amendment does not appear *on its face* to authorize discrimination" (Pet. App. A65) (emphasis in original). And, as the Solicitor General and the Board agreed, the "sparse legislative history" does not "address the question whether Congress intended to authorize the creation of regional banking arrangements" (Board Br. in Opp. 6; Pet. App. A66).

The language of the Douglas Amendment—which merely grants the states power to "permit expansion of banking across state lines where it would otherwise be federally prohibited" (*Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980))—cannot be viewed as expressing advance approval by Congress of the serious form of discrimination at issue here. The literal language of the statute does not refer to or approve any of the many forms of laws that individual states might enact in this field, and even more clearly does not mention concerted state action of any kind. And there is not the slightest indication that Congress meant to waive the traditional protections of the Constitution. Congress' general deference to state law in the Douglas Amendment does not establish such a waiver, since the "negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress has deferred." *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-60 (1982) (emphasis in original).

It is also unavailing to argue in this case that the Douglas Amendment constitutes a "renunciation" of all federal interest in the subject of interstate bank acquisitions. Far from renouncing a federal interest in this intensely regulated field, the Douglas Amendment affirmatively articulates federal policy. Moreover, any suggestion that in 1956 Congress abandoned all interest in the field and implicitly authorized states to form confederations to boycott sister states—without even a word of discussion on that subject—flies in the face of the history of the BHCA and the principle of equality among the states upon which the Constitution is based.

There can be no mistake about the practical implications of the Court of Appeals' misconstruction of the Douglas Amendment. The court has arrogated Congress' policy-making function on one of the most intensely-debated issues to come before Congress in recent years. Neither the New England states nor a federal court should make the decision whether the nation is to be partitioned into regional banking zones. This is a question of profound importance to the entire country, and the decision is wisely vested by the Constitution in the national legislature. The Court of Appeals' creation of "consent" by judicial implication undermines Congress' ability to prescribe public policy in this area, and effectively precludes representatives of burdened states—such as the State of New York—from participating in a "collective decision" on the wisdom of regional banking. *Wunnicke,* 104 S. Ct. at 2243.

2. *The Commerce Clause.* Absent Congressional authorization, the regionally discriminatory Massachusetts and Connecticut statutes clearly violate the Commerce Clause. As the Board found, the purpose and effect of these statutes is to discriminate against the commerce of excluded states in order to favor the commercial interests of local banking institutions (Pet. App. A58). Such openly protectionist and overtly discriminatory legislation is subject to a "per se" rule of unconstitutionality. *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978).

Moreover, even under the more lenient "balancing test," which is reserved for legislation that promotes a legitimate state interest in an even-handed manner, the Connecticut and Massachusetts Acts are unconstitutional. As this Court recently declared in *Lewis,* 447 U.S. at 42-44, any asserted state interest in regulating local financial practices, discouraging undue economic concentration, and preserving local control over financial activities, does not justify discrimination among out-of-state bank holding companies on a naked geographical basis.

3. *The Compact Clause.* The Compact Clause prohibits any compact or agreement between two or more

states that has not been approved by Congress if it tends to impair the interests of sister states or increases the power of the compacting states at the expense of federal authority. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 471, 477 (1978). This Court's decisions establish that the Compact Clause plays a critical protective role where, as here, a multi-state agreement threatens injury to the welfare of excluded states: "This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others." *Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 494 (1855).

As the Board found, both by their very nature as reciprocal statutes and as the result of collaborative actions among representatives of the New England states, the Connecticut and Massachusetts Acts, along with the Rhode Island Act, constitute a compact designed to "create a [New England] regional banking zone" that precludes non-New England companies from controlling banks within the region (Pet. App. A51).

The New England Compact fosters the very kind of divisive regionalism and interference with the federal union that the Compact Clause was designed to avert. Because of its "discriminatory nature" (Pet. App. A58), the New England Compact inflicts substantial injury on all excluded states—particularly "money center" states such as New York, which are the principal targets of the boycott. In addition, by vesting in a confederation of states potentially inconsistent authority over interstate banking, a matter of intense national concern, the New England Compact impermissibly disrupts the balance of power between the states and the federal government.

As the Board noted, Congress has never consented to the New England Compact (Pet. App. A52), despite frequent efforts by proponents of regional banking to obtain the requisite consent in recent sessions of Congress. As a result, the New England Compact plainly violates the Compact Clause.

ARGUMENT

I. The Douglas Amendment Does Not Authorize The Connecticut And Massachusetts Acts

As the Board recognized, "[a]bsent congressional authorization of [the regionally restrictive state laws] in the Douglas Amendment, it appears that [they] would be inconsistent with the standards for state action under the Commerce Clause as established by the Supreme Court" (Pet. App. A55). The Solicitor General has agreed that "[i]n the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause" (Board Br. in Opp. 5). Thus, the government has recognized that the pivotal issue in this case is whether, in the Douglas Amendment, Congress has authorized a group of states to act in concert to form a regional banking zone that boycotts bank holding companies located in excluded states.

Such authorization would depart drastically from the principles upon which our common market economy is based. Therefore, as this Court's decisions make plain, Congressional authorization cannot be inferred. Those contending that Congress has authorized such discriminatory conduct bear a heavy burden of proof that Congress deliberately and specifically intended to approve such a boycott by a group of states against other states.

As the Board found, neither the literal language of the Douglas Amendment nor its legislative history manifests consideration by Congress in 1956 of the types of interstate banking statutes an individual state might enact, much less any Congressional purpose to allow concerted discrimination by groups of states against their sister states (Pet. App. A65-A66). Allowing the courts to imply consent under such circumstances would improperly deprive Congress—the forum in which all states

may be heard—of its Constitutional function of considering and protecting the interests of all the states and of the federal government.

A. The Need For Deliberate and Specific Congressional Authorization

As this Court noted in *H.P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 533 (1949), the Constitution was adopted for the purpose of eliminating regional discrimination destructive of the harmony of the Union. The Court explained that prior to the adoption of the Constitution:

> "'. . . each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.' Story, *The Constitution,* §§ 259, 260. See Fiske, *The Critical Period of American History,* 144; Warren, *The Making of the Constitution,* 567."

To control these dangers, and to avoid the prospect of states retaliating against each other, the Framers of the Constitution entrusted regulation of interstate commerce to the federal government. *See South-Central Timber Development, Inc.* v. *Wunnicke,* —— U.S. ——, 104 S. Ct. 2237, 2243 (1984). The Commerce Clause rested on "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-26 (1979). This Court's decisions construing the Commerce Clause have declared that "[t]he United States could not exist as a nation if each of them were to have the power to forbid imports from another state . . . or to discriminate as between neighboring states in admitting articles produced therein." *Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 351 (1939).

The Framers were not concerned solely with the dangers posed by discriminatory actions by individual states. They also were acutely aware of the even greater danger to the Union posed by groups of states acting through compacts and combinations to oppress excluded states. The debates at the Constitutional Convention vehemently denounced "partial confederations" and regional "combinations" of states aimed at restricting the commerce of other states. *See, e.g.*, J. Madison, *Debates in the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 398, 69th Cong., 1st Sess. 584-87 (1927) ("[i]t seems to be feared that the Northern States will oppress the trade of the South. . . . The middle States may apprehend . . . combinations [against] them between the Eastern & Southern States"); *id.* at 633-38 ("different interests" of the North, South, East, and West would lead to "oppressive regulations" of commerce); *see also id.* at 239-40, 245, 292, 298-99, 302, 304, 315, 374, 382. *The Federalist Papers* also condemned such partial confederacies of states as destructive of the fabric of the Union:

> "Each . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent." *Federalist Paper* No. 7 at 62-63 (Rossiter ed. 1961).

See also id. No. 8, at 66. Accordingly, the Founding Fathers required that interstate compacts that potentially injure other states or the Union at large be approved by Congress, the forum in which all states are represented and have a voice. *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

In view of the importance of the interests at stake, this Court consistently has imposed a heavy burden upon those who contend that Congress has consented to state action that otherwise would violate the Commerce or Compact Clauses. Respondents here are unable to carry that burden.

B. The Douglas Amendment Does Not Provide The Requisite Congressional Authorization

Although they contend that the Douglas Amendment authorizes states to join together to discriminate against out-of-state bank holding companies from other states, respondents cannot agree on where such authorization is to be found. The intervenor-respondents argue that the legislative history provides the required authorization (CBT Br. in Opp. 11-14). The Solicitor General disputes that contention, noting that the "sparse legislative history" does not "address the question whether Congress intended to authorize the creation of regional banking arrangements" (Board Br. in Opp. 6).

Instead, the Solicitor General has suggested that authorization for the discriminatory statutes might be found in the "literal terms" of the Douglas Amendment (Board Br. in Opp. 5). This position, in turn, conflicts with the Federal Reserve Board's findings that "the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states . . ., but against all other states," and that Congress has not approved the New England Compact (Pet. App. A65, A52; emphasis in original).

Respondents' inability to agree on the source of the purported authorization is convincing evidence that they cannot meet their burden under the Commerce and Compact Clauses to demonstrate deliberate and specific Congressional authorization for these concerted, discriminatory state statutes.

1. *The Commerce Clause*

To satisfy the requirements of the Commerce Clause, proponents of discriminatory state laws must demonstrate that Congress has deliberately and specifically authorized the particular deviation from the constitutional mandate of non-discrimination—*i.e.*, has made "unmistakably clear"

its intent to authorize states to discriminate against interstate commerce in the particular manner established by the challenged state law. *Wunnicke,* 104 S. Ct. at 2242.

In its decision last Term in *Wunnicke,* this Court emphasized the need for a showing of specific Congressional consent and refused to imply consent for discriminatory state laws even from parallel or "consistent" policies in federal legislation:

> "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. . . . Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. . . . [W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.* at 2242-43.

The Court emphasized the same requirement of unmistakable approval in *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982), where proponents of a discriminatory state water law asked this Court to find Congressional authorization for the law from 37 federal statutes and a number of Congressionally approved interstate compacts that demonstrated federal deference to state water laws and required "the Secretary of the Interior, in carrying out the provisions of this Act, [to] proceed in conformity with such [state] laws." *Id.* at 959. The Court flatly rejected the contention that this federal deference to and reliance upon state law constituted approval of the discriminatory state enactment:

> "Neither the fact that Congress has chosen not to create a federal water law to govern water rights in-

> volved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' ' 'intent and policy' to sustain state legislation from attack under the Commerce Clause' was 'expressly stated.' " *Id.* at 960 (footnote omitted).

This Court emphasized that Congressional approval of discriminatory state laws cannot be inferred from federal deference to or incorporation of state law standards, because the requirements of the Commerce Clause "are ingredients of the *valid* state law to which Congress has deferred." *Id.* (emphasis in original).

Similarly, in *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982), the Court rejected the claim that state regulations inconsistent with the Commerce Clause were authorized by a provision in the Federal Power Act, reasoning:

> "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' "

Neither the language of the Douglas Amendment nor its legislative history contains the unmistakable authorization this Court requires to enable states to join together to impose discriminatory burdens on the commerce of sister states.

a. The Language Of The Douglas Amendment

The Douglas Amendment states, in relevant part, that the Federal Reserve Board may not approve the acquisition of a bank located in one state by a bank holding company

with its principal place of operation in any other state, unless:

> "the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d).

This language says nothing about the validity of any of the many types of laws a state might adopt in this field. And it says nothing about discrimination by a single state, much less by a group of states, against other sister states. While Congress obviously recognized that some states might individually enact laws permitting interstate banking in the future, the language of the Douglas Amendment nowhere states, or even implies, that such state laws would be immune from the Commerce Clause. Nor, of course, does it discuss the possibility of exclusionary interstate compacts.

In marked contrast, when Congress wishes to approve a state-imposed burden on interstate commerce or an interstate compact, it does so in terms that are unambiguous and that put Congressional representatives from every state on notice of the purpose of the federal action. *See, e.g.*, McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015; Low-Level Radioactive Waste Act, 42 U.S.C. §§ 2021(b)-2021(d).

The foregoing analysis of the literal language of the Douglas Amendment finds direct support in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980), which establishes that the Douglas Amendment does not authorize discriminatory state legislation:

> "[I]t is doubtful that § 3(d) [the Douglas Amendment] authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to

this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited'' (emphasis in original; footnote omitted).

In *Lewis*, the state of Florida contended that its law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by the Douglas Amendment and § 7 of the BHCA, a broadly phrased provision that saved state laws and regulations from federal preemption. This Court held that while ''[i]n contrast to [the Douglas Amendment], § 7 of the Act does reserve to the States a general power to enact regulations applicable to bank holding companies,'' there is ''nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation.'' *Id.* at 48-49. To the contrary, the Court found that ''[f]ar from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an intent to forestall such a broad interpretation.'' *Id.* at 49. Thus, § 7 was designed to countenance ''*only . . . state legislation that operates within the boundaries marked by our Commerce Clause.*'' *Id.* (emphasis added). Since § 7 of the BHCA does not have the effect of waiving the protection of the Commerce Clause, it follows *a fortiori* that the Douglas Amendment —which was enacted at the same time as § 7, and which speaks to the Board and not to the states—has no such extraordinary effect.

Thus, the literal language of the Douglas Amendment can in no way be read as containing the necessary authorization for even an individual state to discriminate among out-of-state bank holding companies in a manner that otherwise would violate the Commerce Clause. Moreover, since the Douglas Amendment speaks simply of a single host ''State,'' it is even more apparent that the Douglas Amendment says nothing about groups of states

joining together to discriminate against commerce deriving from disfavored sister states.

Nor is it tenable to argue that the ability of a state under the Douglas Amendment to lift the federal prohibition on interstate acquisitions provides implicit Congressional authorization for states to engage in concerted, discriminatory activities. This argument is simply an invitation to engage in the type of "speculation as to what Congress 'probably had in mind'" that was condemned by this Court in *New England Power Co.*, 455 U.S. at 343. Congressional approval of discriminatory state laws cannot be inferred merely because Congress contemplates the enactment of state laws in a particular field and defers to those laws. The limited power of states under the Douglas Amendment to enact laws "to permit expansion of banking across state lines where it otherwise would be federally prohibited" (*Lewis*, 447 U.S. at 47) simply does:

> "not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred."

Sporhase, 458 U.S. at 959-60 (emphasis in original).

b. The Legislative History Of The Douglas Amendment

Like the plain language of the statute, the legislative history of the Douglas Amendment provides no indication that Congress intended to allow the states to join together to discriminate among sister states or to balkanize the banking system by adopting exclusionary trade zones. As the Board expressly recognized, "[t]he Douglas Amendment was proposed during the debate on the Senate floor and there is no committee report or other significant legislative history to clarify its meaning" (Pet. App. A66).

In enacting the BHCA, Congress was concerned with effecting a federal ban on the expansion of bank holding

companies across state lines, and not with any state action that might be taken to lift the federal proscription. *Id.* In fact, Congress was of the view that, although the states were empowered to allow such expansion to occur in the future, no state would choose to do so.[16] Consequently, the manner in which a state—and, *a fortiori*, a group of states—might elect to permit interstate banking was never even considered.

It is not surprising, therefore, that there is no indication in the legislative history that Congress intended to authorize discriminatory state legislation. As the D.C. Circuit stated in *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), "[n]ot once in the entire debate is the . . . question raised." Similarly, the Board found that there was "no discussion [in Congress] of the power of the states to discriminate among potential out-of-state entrants" (Pet. App. A66).

Indeed, the legislative history of the Bank Holding Company Act shows that the Douglas Amendment was directed against the very notion of regional interstate banking that the Connecticut and Massachusetts Acts, and the New England Compact, seek to establish. At the time Congress was considering the BHCA, certain bank holding companies were becoming increasingly powerful in particular regions of the country. The expansion of these regional companies was a principal concern of Congress, and one of the purposes of the Douglas Amendment was spe-

16. Representative Spence, the sponsor of the House bill, told Congress that he found no material difference between the BHCA, as amended by Senator Douglas, and the original House proposal, which would have totally prohibited interstate bank acquisitions. 102 Cong. Rec. 7165 (1956) (Pet. App. A118). During the Senate debate, Senator Bricker stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." *Id.* at 6861 (Pet. App. A112-A113). *Accord id.* at 6934 (Sen. Capehart) ("under the proposed legislation we are pretty much freezing the banking system of America") (Pet. App. A117); *id.* at 6860 (Sen. Douglas) (Pet. App. A111-A112).

cifically to prevent such regional banking.[17] Moreover, the legislative history shows that Congress, in enacting the BHCA, fully intended to preserve the traditional equality of the states and to avoid regional discrimination.[18]

Thus, respondents are unable to demonstrate that the Douglas Amendment provides the affirmative and considered Congressional authorization necessary for a state to act in contravention of the principles of free domestic trade and federalism embodied in the Commerce Clause. And they are *a fortiori* unable to show that Congress intended to allow a group of states to join together in a regional confederation designed to inflict such discrimination. As testimony before Senator Douglas' committee emphasized, the proposed bank holding company legislation "maintain[ed] the autonomy of the *separate* states."[19]

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17. *See Control and Regulation of Bank Holding Companies: Hearings on H.R. 1674 Before the House Committee on Banking and Currency*, 84th Cong., 1st Sess. 22-83 (1955) (Ct. App. JA1967-1998); *Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency*, 83rd Cong., 1st Sess. 289 (1953) (Ct. App. JA1999). *See also* 102 Cong. Rec. 6858 (1956) (Ct. App. JA2000). As a later Congress stated in amending the BHCA, the purpose of that statute was to deal with the problem of "the unrestricted ability of such a company to obtain banking units, thereby concentrating the commercial bank facilities *in a particular area* under a single control." S. Rep. No. 91-1984, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 5519, 5520 (emphasis supplied) (Ct. App. JA2002).

18. *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-3 (1955) (Ct. App. JA1942). The legislative history of the BHCA is replete with references to Congress' desire to assure that the statute was nondiscriminatory and did not favor any particular state or region. *See, e.g.*, 101 Cong. Rec. 8180-81 (1955) (Rep. Keating) ("It strikes me that if we are going to enact a bill, which I think we need, we should enact one that applies throughout the Nation and equally to all institutions") (Pet. App. A107); *id.* (Rep. Brown) (Pet. App. A108-A109); *id.* at 8184 (Rep. Smith) (Pet. App. A110-A111); 102 Cong. Rec. at 6861 (1956) (Sen. Bricker) (Ct. App. JA674).

19. Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. 136 (1953) (Testimony of Harry J. Harding, President, Independent Bankers' Association of the 12th District) (emphasis added) (Ct. App. JA1951).

2. *The Compact Clause*

Under the Compact Clause, the need for an unambiguous showing of Congressional consent to save a discriminatory interstate compact is established by the language of the Constitution itself. Art. I, § 10, Cl. 3 provides that "[n]o state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." Such unambiguous consent is essential because, as House Judiciary Chairman Peter W. Rodino, Jr., recently observed, unsupervised regional compacts can convert states into "rival economic coalitions" and "invite retaliation." In view of these dangers, Chairman Rodino emphasized that "[w]hile the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences" (Pet. Reply Brief App. A2).

The Board expressly found that the statutes at issue here could be considered to be part of a compact "that has never been approved by Congress" (Pet. App. A52). This conclusion is compelled by the foregoing analysis, which demonstrates that neither the language nor the legislative history of the Douglas Amendment establishes that individual states were authorized to discriminate against interstate commerce, much less that Congress intended to allow groups of states to enter into discriminatory multi-state compacts.

Speaking solely of a single host "State," and designed to preserve "the autonomy of the *separate* States" (*see supra* at 22, 25), the Douglas Amendment manifests no Congressional intent whatsoever to approve exclusionary multi-state compacts. As this Court has stated, even when Congress refers to regulation by a single State, "the language has no relation to possible joint control by two or more States under the compact clause of the Constitution." *United States* v. *Public Utilities Commission,* 345 U.S. 295, 309 n.16 (1953), quoting *Safe Harbor Water Power Corp.* v. *Federal Power Commission,* 179 F.2d 179, 187 (3d Cir. 1949).

C. The Court Of Appeals Did Not Identify Unmistakable Congressional Authorization

In concluding that the Douglas Amendment authorizes the Massachusetts and Connecticut Acts, the Court of Appeals noted certain remarks by Senator Douglas during the floor debates that referred to the ability of the states to permit the entry of out-of-state bank holding companies "only to the degree that State laws expressly permit them," and which suggested that the Douglas Amendment paralleled the McFadden Act provisions concerning the power of national banks to establish branches (Pet. App. A28, quoting 102 Cong. Rec. 6858 (1956)). However, "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress" is precisely the sort of exercise in guesswork and speculation that this Court has refused to countenance. *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 342 (1982).

Sheer speculation is what is required to convert these few ambiguous comments of Senator Douglas into intentional Congressional authorization of the New England Compact's infringement of established Constitutional principles. Such snippets of conversation:

> "are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause [and the Compact Clause], especially where the Supreme Court has required such explicit and clear authorization of discrimination by the Congress because of the fundamental implications of such discrimination for the federal union" (Pet. App. A67).

Accord Chrysler Corp. v. *Brown,* 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

Furthermore, the above-quoted fragments from the floor debates do not suggest that the Douglas Amendment allows states—especially states acting in concert—to discriminate among bank holding companies in any manner they choose. In referring to "them" generally (*i.e.*, to all "out-of-state

bank holding companies''), Senator Douglas' statement, if anything, supports petitioners' view that the Douglas Amendment does not authorize discrimination among out-of-state bank holding companies in a manner that violates the Constitution. And the Senator's use of the ambiguous phrase ''to the degree that state laws expressly permit them'' is best understood as referring to the number of states that ultimately would choose interstate banking by express statutory enactment, rather than the terms and conditions any future state statute might impose.

Nor do Senator Douglas' references to the McFadden Act, 12 U.S.C. § 36, support the decision below. Quite to the contrary, the McFadden Act sought to assure ''competitive equality'' by giving national banks an ability equivalent to that of state chartered banks to branch within individual states. *First National Bank* v. *Walker Bank & Trust,* 385 U.S. 252, 261 (1966). Limited as it is to state boundaries and grounded as it is in a concern for equality, this federal statute cannot be cited to support the contention that the Douglas Amendment authorizes regional compacts that interfere with interstate transactions and discriminate against bank holding companies based solely on their location.[20]

The Court of Appeals also asserted, however, in deference to the Board, that the Douglas Amendment implicitly sanctions the Massachusetts and Connecticut Acts because it purportedly ''renounces'' all federal interest in interstate banking in favor of the states.[21] This assertion con-

20. *See* Pet. App. A208-A221; *see also* Fisher & Golembe, *The Branch Banking Provisions of the McFadden Act as Amended, reprinted in* Compendium of Issues Relating to Branching by Financial Institutions, Subcommittee on Financial Institutions of the Senate Banking Committee, 94th Cong., 2d Sess. 21 (1976) ("To say that [the McFadden Act] was meant to give the states control over federal branching policy is to misread more than a century of national bank legislation and judicial history.").

21. The Court of Appeals' deference to the Board was surprising since the Board itself expressed uncertainty over this issue (Pet. App. A41), and, in the Court of Appeals, the Board declined to

(footnote continued on next page)

flicts with the Board's finding that Congress has not authorized regional banking compacts (Pet. App. A52). Moreover, it rests on the strained notion that in 1956 Congress, without even considering the possibility of discriminatory state statutes or compacts, and without explicitly addressing the issue, harbored an unexpressed intent to authorize any form of discrimination, no matter how pernicious, irrational, and contrary to constitutional standards. The Court of Appeals adduced no proof of such an intent, nor did it provide any basis to believe that, in considering the Douglas Amendment, a Congressional representative from New York, Texas or California would have realized that the bill would authorize a concerted boycott against his state.[22]

Finally, the Court of Appeals erred in its analysis of the Congressional authorization issue by concluding that "if at any time Congress should find any encroachment [on the part of the New England Compact] it could remove the encroachment by appropriate legislation." This theory would authorize any compact—no matter how pernicious—

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defend its interpretation of the statute, stating that the "legal issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes remains for this Court to decide" (App. Br. 19).

Moreover, the Board's resolution of the constitutional issues in this case was a particularly frail foundation for the Court of Appeals' decision because the Board utilized a standard of review that employs a nearly irrebuttable presumption of the validity of the challenged state laws. *See supra* at 9-10. Under *Whitney National Bank*, 379 U.S. 411, and *Iowa Independent Bankers*, 511 F.2d at 1293 n.4, the Board was obliged to decide these constitutional issues fairly on the merits in light of this Court's past decisions.

Stated otherwise, the "presumptions" applied by both the Board and the Court of Appeals in combination have seriously distorted the analysis of petitioners' constitutional claims. If an administrative agency utilizes a nearly irrebuttable presumption of constitutionality, and the reviewing court thereafter defers to the administrative ruling, there is almost no chance that a state law will ever be found unconstitutional in such a proceeding, no matter how inconsistent it is with the past decisions of this Court.

22. As discussed *infra* at 48-49, the Court of Appeals' "renunciation of federal interest theory" also is an inadequate basis to support the conclusion that the New England Compact is valid under the Compact Clause absent Congressional Approval.

simply because Congress could later invalidate it. That is not the law. The Compact Clause places the burden on the discriminating states to obtain Congressional approval, not on Congress to seek out and police discriminatory compacts.

In short, the opinion of the Court of Appeals offers no support for its conclusion that Congress consented, *sub silentio*, to the discriminatory New England legislation.

D. Allowing Courts Liberally To Imply Congressional Authorization Would Frustrate Congress' Policy-Making Authority

For all the reasons discussed above, respondents cannot establish by any evidence—much less "unmistakable" evidence—that the members of Congress in 1956 made a "collective decision" to allow confederations of states to partition the nation's banking system and erect discriminatory trade zones. *Wunnicke*, 104 S. Ct. at 2242-43. If Congress had intended to relinquish its authority and allow states to create such a "multiplication of preferential trade areas destructive of the very purpose" of the Constitution (*Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366, 380 (1976)), it certainly would have said so in a way that no one could mistake. It did not, and indulging imaginative inferences of authorization here would open the door to unbounded searches for "implicit" Congressional intent to support other types of discriminatory legislation, to the detriment of our federal system and national economy.

Moreover, liberal inferences of unexpressed consent would allow the courts to transfer to themselves and the states policy-making authority that the Constitution has vested in Congress. The consent standards of the Commerce and Compact Clauses guarantee that before a state is subjected to discriminatory legislation by sister states, or the structure of our federal system is otherwise impaired, the national legislature will have focused on the issue, considered the wisdom of imposing discrimination, and approved the departure from constitutional standards

to serve an overriding *national* interest. Representatives of a state that would be subjected to discrimination are entitled to participate in the consideration and ultimate decision, and the national legislature must be able to make policy of nation-wide import. "A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision." *Wunnicke,* 104 S. Ct. at 2243.

If federal courts may imply Congressional approval of discriminatory multi-state arrangements from the general language of federal statutes aimed at different objectives, then the common market of co-equal states guaranteed by the Framers of the Constitution will be exposed to hazards beyond the power of Congress adequately to control, and injured states will be left with no recourse other than retaliation. This would constitute a substantial threat not only to the welfare of states subject to discrimination, but also to the citizens of all states who benefit from the vital national economy protected by those constitutional safeguards.

II. The Connecticut And Massachusetts Acts Violate The Commerce Clause

Absent Congressional consent—which does not exist here—there is no doubt that the discriminatory New England statutes violate the Commerce Clause. The Board and the Solicitor General agree with this conclusion, and the other respondents do not seriously contend otherwise.

This Court consistently has held that when state legislation is openly protectionist—when it overtly discriminates against trade originating from a particular state or states in order to further local economic interests—a *per se* rule of unconstitutionality will be applied. *See, e.g., Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 36 (1980); *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978). On the other hand, when legislation promotes a legitimate state objective in an even-handed manner, the Court balances the state interests advanced against the

federal interest in unencumbered interstate commerce, and requires the state to promote its valid interests with the least possible injury to interstate trade. *See, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As both the Board (Pet. App. A55) and the Solicitor General (Board Br. in Opp. 5) have recognized, the New England Compact and the Connecticut and Massachusetts Acts violate both the *per se* and the balancing tests.

A. The Connecticut And Massachusetts Acts Are Unconstitutional *Per Se* Because They Impose A Geographic Boycott Solely For The Purpose Of Economic Protectionism

The Connecticut and Massachusetts Acts are *per se* invalid because they are blatantly protectionist measures that intentionally interfere with the domestic free market the Commerce Clause was designed to foster. In particular, they: (1) openly and intentionally discriminate against certain bank holding companies solely because their principal places of business (or those of their parents) are located outside of New England; and (2) are designed to insulate New England companies, and especially Connecticut and Massachusetts companies, from competition by non-New England firms.

The plain language and legislative history of the Connecticut and Massachusetts Acts manifest their discriminatory, protectionist purpose and effect. Both Senator Sullivan and Representative Onorato, the principal sponsors of the Connecticut Act, urged the adoption of the regional restriction provision in order to protect Connecticut banking institutions from competition by out-of-state institutions, particularly those located in the nation's money centers, *i.e.*, New York, Illinois, Texas and California.[23] Similarly, the Massachusetts Act, according

23. *See, e.g.*, Conn. Sen. Debate (Sen. Sullivan) ("[T]he main reason for this New England position is . . . to give our banks in Connecticut time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly

(footnote continued on next page)

to its principal sponsor, State Senator John Brennan, was specifically intended to exclude New York and other money center bank holding companies in order to give local companies "the space to grow" (Pet. App. A189). *See supra* at 5-6.

The geographic discrimination in both the Connecticut and Massachusetts Acts reflects the very essence of the local parochialism and protectionism prohibited by the Commerce Clause. *See Lewis*, 447 U.S. at 44; *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538 (1949). Indeed, even if the Connecticut and Massachusetts Acts served objectives beyond local and regional protectionism, those laws would be *per se* unconstitutional, since their effect is to discriminate against interstate commerce. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-24 (1978).

Moreover, the New England Compact is not the handiwork of a single state, but rather is part of a more harmful arrangement by a group of states to discriminate against their sister states and form an insular banking region. This concerted conduct exacerbates the injury caused by the individual statutes and increases their burden on interstate commerce. As the Board correctly recognized, the prohibitions of the Commerce Clause "are particularly applicable to state statutes that selectively confer benefits on one or more states" and deny those same benefits to other states (Pet. App. A56). *Accord Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891) ("[A State] . . . may not . . . make discriminations against the products and industries of some of the States in favor of the products and industries of its own *or of other States*") (emphasis added); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939).

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can so we can thwart any intervention as best we can from the large institutions . . . .") (Pet. App. A159); Conn. House Debate (Rep. Onorato) ("[I]f you want to talk about protecting the integrity of our own Connecticut home banks, what this bill does is gives Connecticut the lead time that it needs to go into the regional areas where they have something in common with other members") (Pet. App. A157).

B. The Connecticut And Massachusetts Acts Cannot Be Justified As Imposing Only An Incidental Burden Necessitated By Legitimate Local Concerns

If, despite the patently discriminatory purpose and effect of the Massachusetts and Connecticut Acts, this Court were to apply the "balancing test" used to evaluate even-handed laws adopted for legitimate purposes, analysis of the regional restriction provisions of those statutes would lead to the same finding of unconstitutionality. The immutable geographic discrimination imposed by these statutes cannot be justified by any legitimate state objective.

In *Lewis,* this Court considered a Commerce Clause challenge to a Florida statute designed to prevent out-of-state banks, trust companies and bank holding companies from owning or controlling an investment advisory business in Florida. Identifying three interests Florida sought to promote through its legislation—regulating local financial practices, discouraging undue economic concentration, and maximizing local control over local financial activities —and without considering whether the statute was unconstitutional *per se,* this Court found that "the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." 447 U.S. at 42. The Court reasoned:

> "Appellant has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based. Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils. . . .
>
> With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case it

would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.* at 43-44 (citations and footnote omitted).

As in *Lewis,* any asserted interest here in protecting against the "presumed evils" of out-of-state banking institutions cannot justify the blanket geographic distinctions made by the challenged statutes. Those laws simply differentiate between companies located in New England and those that are not, and Connecticut and Massachusetts have demonstrated absolutely no basis for inferring that all non-New England bank holding companies possess "the evils of monopoly power," or are "inclined to engage in sharp practices" or any other adverse conduct. Nor is there any reason to conclude that any such "presumed evils" that exist are not shared by New England institutions, or "that the State's interest in local control, to the extent it legitimately exists, has been significantly or evenhandedly advanced by the statutory means that have been employed." *Id.* at 44.

C. The Court Of Appeals Improperly Analyzed The Connecticut And Massachusetts Acts Under The Commerce Clause

The Court of Appeals did not discuss either the *per se* or the balancing tests; rather, it observed that "in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The apparent theory is that any state legislation allowing any interstate bank acquisition is, by definition, less burdensome than the total federal prohibition, and that the states therefore are free to impose whatever restrictions they might choose, no matter how irrational and discriminatory.

Neither logic nor Constitutional precedent suggests that the ability of a state to permit commerce that otherwise would be federally prohibited is in any way equivalent to authority to join together and discriminate against certain sister states. The Court of Appeals' observation overlooks the critical principle of federalism embodied in the Commerce Clause. It is one thing for Congress to restrict interstate commerce, or expressly to authorize its restriction, but it is quite another for the states, lacking any express authority and relying upon Congressional silence, to arrogate that power to themselves.[24] Any regional commerce purportedly fostered by restrictive state legislation is purchased at too high a price when that legislation constitutes blatant discrimination by a group of states against co-equal sister states that may be induced to retaliate and further obstruct the arteries of commerce. *See supra* at 26, 31.

The Court of Appeals' analysis also fails because it ignores the reality of the regionally restrictive Connecticut and Massachusetts Acts. Those statutes embody not only a decision to allow some commerce, but also a conscious joint decision to exclude other commerce. These reciprocal statutes dramatically restrict interstate commerce by boycotting the bank holding companies located in disfavored states, by inhibiting acquisitions by New England bank holding companies of non-New England banks, by realigning the nation's entire banking system, and by potentially inducing retaliation from other states. These restrictions assume special importance because they are not merely the action of a single state, but of a group of states acting in concert to boycott and impair the commerce of sister states. Thus, the Board correctly found that, absent Congressional approval, those statutes impose "a burden on

24. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 543 (1949) ("[i]t is, of course, a quite different thing if Congress through its agents finds . . . restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity").

interstate commerce of the type that would be found by the courts to violate the Commerce Clause" (Pet. App. A58).

D. Respondents Cannot Defend The Connecticut And Massachusetts Acts By Reference To Other Types Of State Statutes

Respondents have argued (*e.g.*, CBT Br. in Opp. 15-19) that the Connecticut and Massachusetts Acts are constitutional because other interstate banking statutes also allow only certain out-of-state bank holding companies to enter the state, although they do not make geographic distinctions. *See supra* at 4. Respondents speculate that if the Connecticut and Massachusetts Acts are unconstitutional, these other, non-regional statutes also may be called into question.

While these other state laws are not at issue here, they are plainly distinguishable from the statutes involved in this case. The other statutes cited by respondents constitute unilateral action by a single state, not joint action by a group of states to harm sister states. Moreover, in contrast to the Connecticut and Massachusetts Acts, the other states' laws do not rest on regional parochialism, do not have the purpose and effect of imposing a boycott against disfavored sister states, and are not a source of friction in the federal system.

The Board correctly rejected this argument, explaining that these other state laws impose "substantially less of a burden on commerce in the furtherance of legitimate state objectives" (Pet. App. A71). The Board recently re-emphasized this fundamental distinction in *Citicorp*, 71 Fed. Res. Bull. 101, 103 (1984), stating that:

> "[S]uch statutes do not raise the serious constitutional questions under the Commerce Clause that are posed when states discriminate against other states based upon location of the out-of-state bank holding company [and] that have arisen with respect to regional

banking compacts in which states allow only bank holding companies in selected other states to acquire banks within the host state to engage in the full range of banking services."

III. The Connecticut And Massachusetts Acts Violate The Compact Clause

Article I, § 10, Cl. 3 of the United States Constitution provides that:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."

This provision embodies one of the fundamental precepts of our federal system of government.[25] In the words of Justice White:

> "In framing the Constitution the new Republic was at pains to correct the divisive factors of the Government under the Articles; and among the most important of these were 'compacts witht the consent of Congs. as between Pena. and N. Jersey, and between Virga. & Maryd.' James Madison, 'Preface to Debates in the Convention of 1787,' 3 M. Farrand, Records of the Federal Convention of 1787, 548 (1937). A compact between two States necessarily achieved some objective unattainable, or attainable less conveniently, by separate States acting alone. Such effects were jealously guarded against, lest the 'Fedl authy [be] violated.' *Ibid.* It was the Federal Government's province to oversee conduct of a greater effect than a single State could accomplish, to protect both its own prerogative and that of the excluded States."

United States Steel Corp. v. *Multistate Tax Commission*, 434 U.S. 452, 482-83 (1978) (White, J., dissenting on other

25. *See supra* at 16-18. *See also* Tribe, *Intergovernmental Immunities In Litigation, Taxation, And Regulation: Separation Of Powers Issues In Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976) ("The compact clause explicitly recognizes Congress' role as chief architect of the federal system.").

grounds). *See also* M. Farrand, *The Framing of the Constitution of the United States* 7-8, 47-48, 153-54 (1913); II G. Bancroft, *History of the Formation of the Constitution* 141 (1882) (noting that a widespread fear of "schemes for a division of the thirteen states into two or more separate groups" led to the adoption of the Compact Clause). *See also* C. Warren, *The Making of the Constitution*, 23, 24, 30, 46, 79, 130, 205-06, 216-18, 257, 293-94, 548-50 (1928).

As a result of this fear of regional combinations, the Framers of the Constitution decided to confer sovereignty upon only two entities: the individual states, with regard to their own internal matters; and the United States, with regard to matters of national concern. They confined "[e]ach state . . . in its government strictly to its own duties within itself," and carefully regulated "any agreement or compact with any other state." II G. Bancroft at 141. The Compact Clause left no room, in the absence of deliberate Congressional approval, for any regional relationship or sub-national agreement among states that might invade the rights of sister states or otherwise impair the harmony of the Union. *Multistate Tax Commission*, 434 U.S. at 477-78 (1978).

A. Massachusetts, Connecticut And Rhode Island Have Formed A Compact

Any suggestion that Connecticut, Massachusetts and Rhode Island adopted their regional banking statutes "unilaterally," or that there is no compact among the states, flies in the face of the record. Within a period of less than a year, these New England states enacted reciprocal statutes imposing virtually identical geographic limitations on entry by out-of-state bank holding companies into their respective states. Indeed, it was only by coordinating their efforts that these states could ensure that regional banking would be established, that uniform barriers to entry by outside companies would be raised, and that the ultimate purpose of the Compact—to insulate New England companies from competition from non-New England firms—would be realized.

Nor were these laws enacted in a vacuum. The Board's findings confirm that the Connecticut and Massachusetts Acts were concerted action resulting from careful planning and discussions between the states:

> "[P]assage of the acts was preceded during a four-month period by a formal meeting of representatives of the New England states to discuss regional interstate banking, by the formation of a New England Committee to Study and Promote Regional Interstate Banking, by testimony of legislators at hearings on the issue before legislative committees in other New England states and by apparent review and comments on the proposed Connecticut legislation by the Massachusetts Banking Department" (Pet. App. A51).

Moreover, as the Board also noted (Pet. App. A51-A52), reciprocal legislation, such as that involved in this case, is in and of itself sufficient to constitute a compact. *Multistate Tax Commission,* 434 U.S. at 470. *See also Virginia* v. *Tennessee,* 148 U.S. 503, 517-18 (1893).[26]

B. The New England Compact Is Precisely The Kind Of Interstate Agreement That The Compact Clause Was Designed To Regulate

Unless it is approved by Congress, an interstate compact violates the Compact Clause if it (1) injures sister states or (2) otherwise encroaches upon federal authority. A compact that has either effect trenches on "the just supremacy of the United States" (Pet. App. A32) because of its "impact on our federal structure." *Multistate Tax Commission,* 434 U.S. at 471.

As the Board expressly recognized and respondents did not contest below, Congress has neither expressly nor impliedly consented to the New England Compact. The

26. *Accord* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 735-48 (1925) (compiling a list of compacts which include a number of reciprocal statutes passed by two or more states establishing rights common to all the states involved).

absence of Congressional endorsement of the New England Compact has been effectively admitted by the proponents of regional banking compacts, who have made repeated *unsuccessful* efforts to obtain federal legislation that would sanction these arrangements. *See supra* at 7.

The New England Compact is precisely the type of compact that is proscribed by the Constitution in the absence of Congressional consent. This Court has characterized those unapproved compacts that do not violate the Compact Clause as "catalyst[s] of cohesion," which reflect efforts to harmonize interstate relations "through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *New York* v. *O'Neill,* 359 U.S. 1, 6 (1959).[27] Thus, the Board recognized that "[w]hile there are judicial decisions upholding interstate agreements, these agreements have not had the objective of discrimination but rather that of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements" (Pet. App. A50 n.5).

This is the first case to reach this Court that squarely raises the constitutionality of a compact that (1) has not been approved by Congress, (2) poses a direct affront to the sovereignty of excluded sister states, and (3) is inconsistent with a regulatory scheme established by the federal government. The New England Compact is radically different in purpose and effect from the agreements that have been approved by this Court in that, instead of promoting cooperation, the discriminatory New England Compact benefits New England states at the

27. Examples of such compacts for which Congressional consent is not required include the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, referred to in *New York* v. *O'Neill,* 359 U.S. at 3, 11 (the Constitution does not preclude states from adopting "reciprocal, voluntary legislation . . . to accomplish fruitful and unprohibited ends"); the Multistate Tax Commission at issue in *Multistate Tax Commission,* 434 U.S. 452; and the Interstate Compact on Mental Health and the Colorado River Compact of 1921 (as described in F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* (1976)).

expense of all other states and affects a subject of significant national concern by interfering with and disrupting federal regulation of interstate banking. *See* Letter from Peter W. Rodino, Jr. to Thomas P. O'Neill, Jr. (legislation authorizing regional banking "would appear to authorize a commercial compact open only to a 'select' group of States in subject matter areas specifically regulated by the Federal Government") (Pet. Reply Brief App. A2).

1. The New England Compact Benefits The Compacting States At The Expense Of Excluded States And Deranges Relations Among The States Of The Union

This Court consistently has recognized that the Compact Clause was designed to prevent groups of states from increasing their power at the expense of sister states and thereby undermining the Union. For example, in *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838), the Court stated that "in giving to congress the power of dissenting to such compacts," the Constitution intended "to guard against the derangement of [a state's] federal relations with the other states of the Union." And, in *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855), the Court observed that:

> "By the 10th section of the 1st article of the constitution, no State can enter into any agreement or compact with another State, without the consent of congress. . . . *This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others.* And the right and the duty to protect these interests is vested in the general government" (emphasis supplied).

The same rationale was employed by this Court in the recent case of *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978). While the majority and

dissenting opinions disagreed about the proper application of Compact Clause principles to the facts of that particular case, they agreed that a multistate compact would require Congressional approval if it disturbed relations among sister states. Accordingly, the majority carefully considered the question whether the multistate tax compact would "redound to the benefit of any particular group of States or to the harm of others." *Id.* at 477.

Justice White's dissenting opinion in the *Multistate Tax Commission* case also emphasized that a compact that impairs the interests of sister states is forbidden unless explicitly approved by Congress. Noting that the majority "appears to recognize that allegations of harmful impact on other States is a cognizable challenge to a compact," *id.* at 495, Justice White stressed that:

> "There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority, nor is that surprising in view of the Federal Government's preeminent purpose to protect the rights of one State against another. If the effect of a compact were to put non-compact States at a serious disadvantage, the federal interest would thereby be affected as well." *Id.* at 494-95.

Justice White also emphasized the essential protective role of Congress in reviewing multi-state compacts of concern to excluded states:[28]

> "As the constitutional arbiter of political differences between States, the Congress is the proper body to evaluate the extent of harm being imposed on non-Compact States, and to impose ameliorative restrictions as might be necessary." *Id.* at 496.

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28. *See also Cuyler* v. *Adams,* 449 U.S. 433, 451 (1981) (Rehnquist, J., dissenting on other grounds) (noting that to fall within the purview of the Compact Clause, a compact must encroach on federal supremacy or "elevate member States at the expense of nonmembers"); F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1976) (compacts that have a discriminatory effect upon non-party states "could be described as affecting the political balance of the federal system").

By its very nature, the New England Compact is intended to, and does, benefit member states to the detriment of excluded states. Indeed, the exclusion of non-New England states, and the aggrandizement of the member states, is the very *raison d'etre* of the New England Compact. The legislative history of the Connecticut and Massachusetts Acts confirms the protectionist, exclusionary nature of these statutes, and the Compact of which they are part. *See supra* at 5-6, 32-33.

The unconstitutionality of the New England Compact is underscored by this Court's analysis of the fundamentally different type of interstate agreement upheld in *Multistate Tax Commission*. Three critical points distinguish the *Multistate Tax Commission* compact from the one involved in this case.

First, membership in the Multistate Tax Commission was open to all states on a uniform basis. The New England Compact is open only to six states, and excluded states have no means available to protect their sovereign interests. *Second,* the Court in *Multistate Tax Commission* found that the risk of any potential harmful effects was "independent of the Compact," since the individual states could have imposed identical effects on the appellants there without entering into an agreement. 434 U.S. at 478. In contrast, the competitive advantages to be secured by an exclusionary banking region can only be realized by means of an arrangement among the states located within the region. *Third,* the *Multistate Tax Commission* compact involved nothing that would "redound to the benefit of any particular group of States or to the harm of others." *Id.* at 477. Markedly different is the New England Compact, which substantially benefits the New England states at the expense of all others. *See also New York* v. *O'Neill,* 359 U.S. at 6 (upholding a compact on the grounds that the arrangement was "voluntary and cooperative" and, most importantly, that it "increas[ed] harmony within the federalism created by the Constitution").

Thus, standing by themselves, the adverse effects of the New England Compact on excluded sister states are enough to invalidate the Compact.

2. The New England Compact Encroaches Upon The Exercise Of Federal Authority

The fact that the New England Compact has the purpose and effect of increasing the power of member states at the expense of all other states is itself a serious encroachment upon the supremacy of the Union. Our federal system owes its very existence to the Founding Fathers' condemnation of the parochial alliances and partial confederacies among states that developed under the Articles of Confederation. *See supra* at 16-17. As this Court stressed in *Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911), "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."

The New England Compact encroaches on federal authority in other ways as well. There can be no dispute that the New England Compact affects interstate banking, an area that, because of its critical national importance, is subject to federal regulatory authority. In this Court's words, the federal government retains a "broad and comprehensive national authority over the subjects of revenue, finance, and currency." *Norman* v. *Baltimore & Ohio Railroad Co.,* 294 U.S. 240, 303 (1935). Indeed, the vital federal interest in the interstate attributes of banking activities is apparent from the:

> "impressive array of federal statutes regulating not only the provision of banking services but also the formation of banking organizations, the rendering of investment advice, and the conduct of national investment markets."

Lewis v. *BT Investment Managers, Inc.,* 447 U.S. 27, 38 (1980).

In the New England Compact, Connecticut, Massachusetts and Rhode Island have far exceeded the scope of any action permitted them by the Douglas Amendment or any other federal legislation. They have aggregated powers granted to individual states over internal banking structure, and have thereby "project[ed] a new presence

onto the federal system" established by Congress to regulate interstate banking. *Multistate Tax Commission*, 434 U.S. at 469 n.21. This attempt to control interstate banking is clearly improper, for the states cannot through a compact "exercise any powers they could not exercise in its absence." *Id.* at 473.

The New England Compact also poses a substantial threat to federal policy articulated in 12 U.S.C. § 1823(f), part of the recently enacted Garn-St Germain Depository Institutions Act of 1982. That statute contemplates that the Federal Deposit Insurance Corporation ("FDIC") will arrange acquisitions of failing or failed banking institutions by out-of-state bank holding companies. The Connecticut Act, however, prohibits Connecticut banks and bank holding companies from acquiring non-New England banks (Pet. App. A99), and thereby prevents the FDIC from looking towards Connecticut banking institutions to save failing or failed non-New England banks. The Connecticut Act also inhibits the ability of the FDIC to solicit bids for failing or failed non-New England banks from bank holding companies located in other New England states (*e.g.*, Massachusetts) that control or desire to control a Connecticut bank. This is because such a company would be required to divest itself of its Connecticut banks, or would be prohibited from making such an acquisition, if it acquired a non-New England bank (Pet. App. A99).

The Connecticut Act and the New England Compact of which it is part thus conflict with the paramount federal policy encouraging the interstate acquisition of failing or failed banks, and accordingly infringe the Compact Clause as well as the Supremacy Clause (Art. VI, Cl. 2) of the Constitution. Moreover, as this Court recognized in *Multistate Tax Commission*, the pertinent inquiry under the Compact Clause is one of "potential, rather than actual impact on federal supremacy." 434 U.S. at 472. The forbidden "potential impact" exists here because the practical effect of the challenged legislation is "to discourage conduct that federal action seeks to en-

courage." L. Tribe, *American Constitutional Law* § 6-24, at 378 (1978). *See, e.g., Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967).

3. The "Renunciation Of Federal Interest" Theory Does Not Save The New England Compact

Despite the adverse impact of the New England Compact on excluded states and federal authority, the Court of Appeals endorsed the Board's unsupported view that the compact is constitutional because, in enacting the Douglas Amendment, Congress somehow renounced all federal interest in interstate banking (Pet. App. A29). This assertion ignores the purpose of the Compact Clause—to ensure that states do not join together to aggrandize themselves and injure their sister states. Even total renunciation by the federal government of its interest in the regulation of interstate banking could not justify an effort by states to combine against the welfare of other co-equal states. Congressional approval of such a divisive compact is necessary not only to protect the interests of the federal government itself, but also to ensure that an injured state has a forum in which to be heard before other states impair its local economy.

Moreover, the view that the Douglas Amendment represents a "renunciation of federal interest" in the area of interstate banking conflicts with both the language and history of that statute—which supports no such conclusion, *see supra* at 20-25, and the Board's finding that Congress has not consented to exclusionary banking compacts (Pet. App. A52). It is simply untenable to argue that, while Congress has never approved discriminatory regional banking compacts, the ability of individual states to lift the federal ban on interstate banking constitutes "advance" Congressional consent for states to form any discriminatory banking combination they might choose. Such creation of consent by judicial implication would eviscerate the Compact Clause and strip Congress of its essential policy-making function.

Beyond this, the "renunciation of federal interest" theory ignores the procedure for congressional review and

appraisal of proposed compacts. As Chairman Rodino has explained:

> "Typically, compacts are negotiated and agreed to by the States and then submitted to Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences" (Pet. Reply Brief App. A2).

Finally, far from abandoning the subject of interstate bank holding company expansion to the unlimited discretion of the states, the Douglas Amendment affirmatively articulates federal policy in this area—that there shall be no interstate bank acquisitions except as each state, acting individually, may through the enactment of a valid statute make exceptions with regard to acquisitions of banks within its own borders. Recently amended in 1982 to comport with federal policy on the acquisition of failing banks (*see supra* at 46-47), the Douglas Amendment demonstrates that the federal government has a paramount interest in regulating the interstate expansion of bank holding companies, an interest that has been impaired by the effort of New England states to create a regionally restrictive interstate banking system.

Thus, the Second Circuit was plainly wrong in holding that in 1956, without a single word to show its intent, Congress totally abandoned a critical field of interstate commerce to discriminatory balkanization by regional confederations of states. Indeed, the error in the Court of Appeals' "renunciation" theory is revealed beyond any doubt by the fact that this case involves the review of orders of a federal agency entrusted by Congress with approving bank acquisitions pursuant to specific criteria prescribed by Congress. 12 U.S.C. 1842(c).

In sum, because the New England Compact lacks Congressional approval, aggrandizes certain states at the expense of others, and substantially interferes with federal authority over interstate banking, that Compact, and

the Connecticut and Massachusetts Acts which are part of the Compact, violate the Compact Clause.

* * *

We end this brief on the note sounded at the very beginning. Potentially destructive of fundamental values embedded in the Constitution, regionally discriminatory banking compacts are too important to escape Congressional review and approval. If proponents of these measures have economic arguments to advance in their favor, Congress should be the arbiter of their merits. Since Congress repeatedly has failed to approve such discriminatory interstate arrangements, the purpose of the Commerce and Compact Clauses would be subverted by judicial "implication" of consent from existing laws that say not a word about that subject. This Court should reaffirm the primacy of Congress' policy-making function by reversing the decision of the Court of Appeals and permitting the debate to proceed before the national legislature—the place where the Framers intended it to occur.

Conclusion

For the reasons set forth above, petitioner Citicorp respectfully requests that the judgment of the Court of Appeals be reversed and that the Connecticut and Massachusetts Acts be declared unconstitutional.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel of Record

Of Counsel:

CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153

ROBERT L. STERN
STEPHEN M. SHAPIRO

MAYER, BROWN & PLATT
231 LaSalle Street
Chicago, Illinois 60604

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No. 84-363

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OCTOBER TERM 1984

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Petitioners,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION

RICHARD S. SIMMONS
ROBERT F. MULLEN*
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000
**Counsel of Record*

Counsel for The New York Clearing House Association as Amicus Curiae

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N.Y. 10005

DEBORAH S. PRUTZMAN,
General Counsel,
The New York Clearing House Association,
100 Broad Street,
New York, N.Y. 10004
(212) 943-2200

Of Counsel.

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION

INTEREST OF AMICUS CURIAE

The New York Clearing House Association (the "Clearing House") is an association of 12 leading commercial banks

located in New York City.[1] It operates electronic payment systems and clears commercial drafts and items in the New York area. In addition, it has filed briefs as *amicus curiae* in cases presenting significant general questions of law affecting banking in the United States.

Members of the Clearing House have a direct and vital interest in issues affecting interstate banking and in the proper interpretation of Federal banking statutes such as the Bank Holding Company Act. The Clearing House believes that the Connecticut and Massachusetts statutes at issue here impose an impermissible burden on interstate commerce, not authorized by Congress, in violation of the Commerce and Compact Clauses. The Clearing House believes that the views presented in this brief will provide assistance to the Court in its consideration of these issues.

CONSENT OF THE PARTIES

All parties to this action have consented to the filing of this brief. The written consent of each party has been filed with this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose and effect of the Connecticut and Massachusetts statutes is to exclude non-New England bank holding companies in order to protect New England commercial banking from competition. Such patent economic protectionism is impermissible under the Commerce Clause unless it has been unmistakably authorized by Congress. These state statutes were not authorized by Section 3(d) of the Bank Holding Company Act. Section 3(d) authorizes states to permit entry

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank & Trust Company.

by out-of-state bank holding companies, but that is all it authorizes. It is not a license to discriminate among the several states.

Moreover, no matter how broadly Section 3(d) is construed with respect to unilateral state action, it clearly does not authorize states to take *joint* action. Because agreements between states to enhance their power over interstate commerce are governed by the Compact Clause, the failure of Connecticut and Massachusetts to obtain Congressional approval for their joint action violates that Clause.

ARGUMENT

Analysis of the constitutionality of the Connecticut and Massachusetts statutes must, at the outset, be placed in the context of the fundamental policies they violate. A primary goal of the Framers of the Constitution was to ensure the free flow of commerce within the United States. This goal was accomplished principally through the inclusion in the Constitution of the Commerce Clause,[2] which prohibits state action that unreasonably burdens interstate commerce. Further, because joint state action poses special risks to the supremacy of the Federal government, the Compact Clause[3] requires Congressional consent to agreements between states that enhance their power over commerce.

The state of affairs before the adoption of the Constitution made clear the need for national regulation of commerce:

> "The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be

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[2] U.S. Const., art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States . . . ."

[3] U.S. Const., art. I, § 10, cl. 3: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

> forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination."[4]

This lack of Federal power over commerce and the "exercise of [that] power separately, by the States [had] not only proved abortive, but engendered rival, conflicting and angry regulations".[5] As Madison reported:

> "It seems to be feared that the Northern States will oppress the trade of the Southern. . . . The middle States may apprehend . . . combinations against them between the Eastern & Southern States . . . ." J. Madison, *supra* note 5, at 438-41.

In response to this problem, above all others, the Federal Convention of 1787 convened to draft a Constitution "adequate to the exigencies of government and the preservation of the Union".[6] The "one object riding over every other in the adoption of the Constitution" was thus "to keep the commercial intercourse among the States free from all invidious and partial restraints", *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 231 (1824), and "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation". *Hughes v. Oklahoma,* 441 U.S. 322, 325-26

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[4] *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 445-46 (1827).

[5] J. Madison, *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States* 11 (ed. Hunt & Brown 1920).

[6] Resolution of Congress, Feb. 21, 1787, in 1 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 120 (2d ed. 1866).

(1979).[7] The Commerce Clause and Compact Clause were adopted to prevent such "economic Balkanization".[8]

1. The Statutes Violate the Commerce Clause.

(a) The statutes impose an unreasonable burden on interstate commerce.

The Commerce Clause "by its own force, prohibits discrimination [by any state] against interstate commerce". *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 185 (1938); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976). A state statute thus violates the Commerce Clause if it has a discriminatory purpose or discriminatory effect upon out-of-state firms or goods. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354

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[7] *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827):

> "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress."

See also The Federalist Papers No. 22, at 144 (Rossiter ed. 1961) (absent national regulation, the "interfering and unneighborly regulations of some States . . . would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy").

[8] *See Milk Control Board v. Eisenberg Farm Products Co.*, 306 U.S. 346, 351 (1939):

> "When the people declared 'The Congress shall have Power . . . To regulate Commerce . . . among the several States, . . .' their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein."

(1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935).

Where a statute effects "simple economic protectionism, . . . a virtually *per se* rule of invalidity has been erected". *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (invalidating statute prohibiting use of waste landfill sites for waste collected outside state).[9] Were the law otherwise, "we [would be] brought back to the condition of things which existed before the adoption of the Constitution . . . ." *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 498 (1887).[10]

The statutes at issue[11] are plainly offensive to this Constitutional mandate. They are the product of unabashed economic protectionism directed against non-New England states. On their face, they allow out-of-state bank holding companies to acquire control of an in-state bank only if the princpal place of business of the acquiring holding company is in New England. The statutes' legislative histories make clear that they were avowedly designed to exclude "the big money

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[9] *Accord, Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3055-57 (1984) (invalidating statute imposing excise tax on sale of liquor while excepting certain local products); *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535-39 (1949) (invalidating statute allowing denial of entry by out-of-state milk distributors if entry would "tend to a destructive competition" in local market); *Minnesota v. Barber*, 136 U.S. 313, 323-29 (1890) (invalidating statute that prohibited sale of meat of animals not inspected within state before being slaughtered).

[10] *See also Pennsylvania v. West Virginia*, 262 U.S. 553, 599 (1923):

> "[absent the Commerce Clause,] Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."

[11] 1983 Conn. Act 83-411 (Reg. Sess.) (reprinted in the Appendix to the Petition for Certiorari [hereinafter "Pet. App."] at A97); Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (Pet. App. A101).

center banks"[12] in order "to give our banks . . . time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly can".[13]

That exclusionary device erects "an economic barrier protecting a major local industry" from competition from without the region and establishes "the mutiplication of preferential trade areas". *Dean Milk Co. v Madison,* 340 U.S. at 356. Such efforts "to suppress or mitigate the consequences of competition between the states" are precisely what the Commerce Clause forbids. *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 352 (1977); *see Brimmer v. Rebman,* 138 U.S. 78, 82 (1891) (state may not "make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States").

No constitutionally justifiable "local benefit" outweighs the burden these statutes place on interstate commerce. Indeed, the only claimed "local benefit" is the very economic protectionism that the Constitution prohibits. The purported interest of

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[12] *Enlivening Banking for Fun and Fireworks,* N.Y. Times, April 3, 1983, at F4, col. 2 (quoting Massachusetts State Senator Brennan) (Pet. App. A189).

[13] Conn. Sen. Debate at 64 (May 18, 1983) (Sen. Sullivan) (Pet. App. A159); *see also* Conn. House Debate at 259 (May 26, 1983) (Pet. App. A158) (Rep. Onorato: states pass regional laws to "protect what's theirs that's within their own state" before banks from other regions enter market); Mass. Joint Standing Comm. on Banks and Banking, Research Staff Summary at 1 (November 9, 1982) (Pet. App. A150) (bill's purpose is to establish "the necessary authority for a regional, New England banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority"); 70 Fed. Res. Bull. 374, 382 (1984) (Pet. App. A58) (approving merger of Bank of New England Corp. with CBT Corp.: "The discriminatory nature [of the Connecticut statute] is apparent from its legislative history, which demonstrates the intention of the Connecticut legislature to permit Connecticut banks and bank holding companies to develop and consolidate on a regional basis before having to compete with banks outside the region").

Connecticut and Massachusetts in "thwart[ing] any intervention as best we can from the large institutions" (Connecticut Senator Sullivan)[14] in an effort to avoid "stiffer competition" (Massachusetts Senator Brennan)[15] cannot be permitted under our Federal system of commerce:

> "In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980).

(b) Section 3(d) of the Bank Holding Company Act does authorize the creation of regional banking systems.

Section 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1824(d), does not save these statutes. While Congress may at times "permit the states to regulate the commerce in a manner which would otherwise not be permissible", *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945), its intent to remove state legislation "from the reach of the dormant Commerce Clause . . . must be *unmistakably clear*". *South-Central Timber Development Inc. v. Wunnicke*, 104 S. Ct. 2237, 2242 (1984) (emphasis added). This is so because when state regulation affecting commerce

> " 'is of such a charter that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.' . . . On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. . . . A rule requiring a clear

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[14] Conn. Sen. Debate at 64 (May 18, 1983) (Pet App. A159).
[15] Conn. Sen. Debate at 15 (March 3, 1983) (Pet. App. A155).

expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.* at 2243.

This Court has repeatedly rejected the argument that Congress has authorized the imposition of a burden on interstate commerce by a state if there is any ambiguity as to that authorization. *E.g., South-Central Timber Development Inc. v. Wunnicke,* 104 S. Ct. 2237, 2240-43 (1984); *Sporhase v. Nebraska,* 458 U.S. 941, 958-60 (1982); *New England Power Co. v. New Hampshire,* 455 U.S. 331, 340-44 (1982); *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 44-49 (1980); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 379 (1964); *United States v. Public Utilities Commission,* 345 U.S. 295, 299-311 (1953); *see also Bacchus Imports, Ltd. v. Dias,* 104 S. Ct. 3049, 3057-59 (1984) (state liquor tax discriminating against interstate commerce not saved by 21st Amendment; although the amendment allows a state to exclude liquor entirely, it does not follow that the state is authorized to discriminate among its sister states if it chooses not to exclude all liquor).

It is, by contrast, only when Congress has spoken with unambiguous precision that this Court will find burdensome state regulation to have been sanctioned. *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 414 n.17 (1983) (Senate Conference Report states that "the Congress . . . is ceding its authority under the commerce clause of the Constitution . . . to affected States"); *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 653-55 (1981) (federal statute provides that state regulation of taxation of insurance business "is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"); *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 427-29 (1946) (same).

Section 3(d) of the Bank Holding Company Act does not authorize Massachusetts and Connecticut to form a regional

banking system or to discriminate against the bank holding companies of particular states—much less authorize such action with "unmistakable" clarity. That section merely provides:

> ". . . no application [to the Federal Reserve Board of Governors] . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries are principally conducted . . . *unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication*". 12 U.S.C. § 1842(d) (1984) (emphasis added).

This language plainly allows individual states to permit the acquisition of in-state banks by out-of-state bank holding companies. It does not with "unmistakable" clarity grant states the right to discriminate among their sister states.[16] As the Federal Reserve Board of Governors recognized, Section 3(d)

> "does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states. . . . [This language]

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[16] States may effectively continue the federal prohibition on acquisition of state banks by out-of-state bank holding companies by declining to pass legislation that would allow entry by such holding companies. But, such power to exclude, without more, does not carry with it the power to discriminate. States may not "use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution". *Looney v. Crane Co.*, 245 U.S. 178, 188 (1917); *accord, Herndon v. Chicago, Rock Island and Pacific Railway Co.*, 218 U.S. 135, 158-59 (1910); *cf. Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 657-58 (1981) ("a State may not impose *unconstitutional* conditions on the grant of a privilege") (emphasis in original).

does not appear to meet the stringent test of explicitness laid down by the Supreme Court." 70 Fed. Res. Bull. 374, 384 (1984) (Pet. App. A65) (emphasis in original).[17]

Nor does the section's legislative history evince a Congressional contemplation and acceptance of the regional parochialism of the statutes at issue. Section 3(d) was introduced by Senator Douglas as an amendment to the Bank Holding

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[17] Having stated the proper standard, the Board proceeded to apply a totally different one. In essence, the Board required the protestants to establish with unmistakable clarity that Section 3(d) did *not* authorize the challenged statutes. While acknowledging that the issue of authorization was not "free from doubt", the Board relied on the "principle of statutory construction that legislatures are presumed to have acted within constitutional limits", and decided to hold the Connecticut and Massachusetts statutes constitutional unless shown "clear and unequivocal" evidence to the contrary. *Id.* at 376-77 (Pet. App. A40-41) (approving merger of Bank of New England Corp. and CBT Corp.); *accord,* 70 Fed. Res. Bull. 524, 525-26 (1984) (Pet. App. A83) (approving merger of Bank of Boston Corp. and Colonial Bancorp, Inc.); 70 Fed. Res. Bull. 353, 354 (1984) (Pet. App. A74) (approving merger of Hartford National Corp. and Arltru Bancorporation). Applying this erroneous standard, the Board read Section 3(d) broadly and found the challenged statutes constitutional.

The Board's error was compounded by the Court of Appeals for the Second Circuit which not only failed to correct the mistake, but gave "substantial deference" to the Board's "finding". *Northeast Bancorp, Inc. v. Board of Governors,* 740 F.2d 203, 207-08 (2d Cir. 1984) (Pet App. A29). The Second Circuit purported to be deferring solely to the Board's statutory interpretation but, as shown above, this interpretation was based upon a misapprehension of the constitutional standard for interpreting statutes that are argued to have delegated Congress' power over commerce. The Second Circuit's opinion can thus be entitled to little or no weight. Indeed, even if the Federal Reserve Board should apply such a standard because it is an administrative agency and not a court, deference upon judicial review constituted an impermissible abdication of the Court of Appeal's duty, under Article III of the Constitution, independently to decide issues of constitutional law. *Crowell v. Benson,* 285 U.S. 22, 60 (1932); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176 (1803); *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 63-70 (1982) (Brennan, J.). At the very least, therefore, this Court should remand to the Court of Appeals with instructions to apply the proper standard of review.

Company Act then under consideration, and passed during a floor debate. It was given no interpretation or analysis by the collective body of Congress.

As the Federal respondent concedes,

> "The sparse legislative history of the Douglas Amendment does not directly address the question whether Congress intended to authorize the creation of regional banking arrangements, and therefore does little to illuminate the meaning of the statutory language. . . . [*T*]*here was no congressional discussion of the specific types of action that the states might or might not take under the Douglas Amendment.*" Brief for the Federal Respondent in Opposition to the Petition for Certiorari at 6 (emphasis added).[18]

The sole references in the legislative history to the power of states over out-of-state bank holding companies do not, with "unmistakable" clarity, authorize the discrimination among states here at issue. On the contrary, they consist

> "in large part of conclusory statements by Senator Douglas to the effect that his Amendment would 'permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them' ([102 Cong. Rec.] at 6858 [1956]), would 'prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so' (*id.* at 6859), or would leave room for the exercise of 'State policy' in the banking field (*id.* at 6860)". *Id.*

This Court has warned against "[r]eliance on such isolated fragments of legislative history". *New England Power Co. v.*

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[18] *See also* 70 Fed. Res. Bull. 374, 385 (1984) (Pet. App. A66) (there was "no discussion [in Congress] of the power of the states to discriminate among potential out-of-state entrants"); *Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288, 1296 (D.C. Cir.) ("Not once in the entire debate is the discrimination question raised"), *cert. denied,* 423 U.S. 875 (1975).

New Hampshire, 455 U.S. 331, 342 (1982).[19] Courts may not rewrite legislation "based on mere speculation as to what Congress 'probably had in mind' ", *id.* at 343—and nothing could be more improbable than that Congress, without any discussion, intended to authorize the Balkanization of commerical banking.[20] Absent clear Congressional intent[21] to sustain otherwise discriminatory state regulation of interstate commerce, Section 3(d) cannot be interpreted as authorization for the statutes in question.

2. **The Statutes Violate the Compact Clause.**

The Constitution also bars the discrimination effected by the Connecticut and Massachusetts statutes because it is accomplished through an agreement between states. The Compact Clause prohibits, absent Congressional consent, agreements among the states

> "which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects

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[19] *See also Garcia v. United States,* 105 S. Ct. 479, 483 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the committee reports on the bill . . . . We have eschewed reliance on the passing comments of one member . . . and casual statements from the floor debates"); *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979) ("[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"); *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 396 (1951) (Jackson, J., concurring) (to "select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its most important functions").

[20] The only results of Section 3(d) which appear to have been anticipated by Congress were "an absolute prohibition against future expansion by bank holding companies", 102 Cong. Rec. at 6,861 (statement of Senator Bricker), and a "freez[e of] the banking system of America". *Id.* (statement of Senator Douglas).

[21] This Court has previously observed that the intent behind Section 3(d) is not clear: "it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities". *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 47 (1980).

placed under their entire control". *Virginia* v. *Tennessee,* 148 U.S. 503, 517-18 (1893).[22]

In *U.S. Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978), This Court made clear that agreements which "enhance[ ] state power with respect to commerce", *id.* at 475, comprise one class of agreements that meet this standard and are therefore subject to the consent requirement of the Compact Clause. The Court in *U.S. Steel* explained that the Compact Clause applies when two states obtain by joint action power over interstate commerce that neither could have obtained alone. *Id.* The statutes at issue, in creating a regional banking system, manifest exactly an exercise of such power.

It cannot be seriously argued that the agreement between New England states to create a regional banking system does not enhance the power of the states with respect to commerce beyond that of any of the states acting alone. The admitted purpose of each statute is to foster the growth of New England banks and to increase their power in anticipation of broader competition. As Massachusetts Senator Brennan testified before the Connecticut legislature:

> "I welcome the opportunity to share with you some of our ideas and concepts that grew up and developed and evolved over the so called regional or New England Regional Experimental Banking Network, if you will . . . . I think it is advisable for a region such as ours, a region that has a tradition of cooperativeness, a region that has a tradition of regional pride, Mr. Chairman, to get up and get going in terms of providing the banking institutions within this region whoever had a tradition and a concern

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[22] All agreements, formal or informal, including those reached through reciprocal legislation, are within the scope of the Clause. *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 470-71 (1978); *see Virginia v. Tennessee,* 148 U.S. at 517-518. That the statutes here at issue constitute an agreement is made clear by the fact that, as the Federal Reserve Board of Governors found, Connecticut, Massachusetts, and other New England states worked closely together prior to the statutes' enactment "to discuss regional interstate banking" in an "effort to create a regional banking zone". 70 Fed. Res. Bull. 374, 380 (1984) (Pet. App. A51).

> for the stability and the vitality and the economic health of this region. Provide those entities with a testing ground for a freak [sic] period of time, so that they will have an opportunity to be in a healthier situation, they'll have an opportunity to accustom themselves, if you will, to the rigas [sic] of interstate banking, before they have to go head on head with the stiffer competition on a national basis . . . ." Conn. Sen. Debate at 14-15 (March 3, 1983) (Pet. App. A153, A155).

Senator Sullivan of the Connecticut Senate likewise made this clear:

> "what the committee did and in what we consider our wisdom was to come forth with a measure which would follow the Massachusetts bill that has passed which is a New England pact and to follow the Rhode Island pact to the extent that they have formed a, or passed a statute restricting it to New England even though they have a trigger mechanism in 1986, I think it is, which that law has passed the legislature in Rhode Island. [W]e've come up with the measure to create a New England banking law . . . ." Conn. Sen. Debate at 61 (May 18, 1983) (Attachment A at 2).

And, as Representative Gilligan explained in urging that the Connecticut statute be effective immediately:

> "There's everything to be gained by seizing the opportunity of getting out into the market and permitting ourselves to participate along with Massachusetts in mutually advantageous mergers to buttress the position of the local banking industry for the survival test they'll face in the very near future." Conn. House Debate at 288 (May 26, 1983) (Attachment B)

No state by itself could create a regional banking system populated by the large financial institutions that will exist if the acquisitions challenged in this case are consummated. It is only joint action by New England states that can enhance the power

of that region over interstate banking. Such joint action, however, must be approved by Congress pursuant to the Compact Clause. No such approval has been obtained.

The Bank Holding Company Act does not say anything about *joint* action among the states. In those cases where this Court has found the requisite Congressional consent under the Compact Clause, there has consistently been a clear expression of intent to approve *joint* action. *E.g., Cuyler v. Adams,* 449 U.S. 433, 441 (1981); *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 277 (1959); *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 25 (1951). Nothing in the text or legislative history of Section 3(d) suggests that in 1956 Congress even considered, much less approved, the possibility of joint action.

Finally, the suggestion of the Court below that the agreement between Connecticut and Massachusetts would not violate the Compact Clause because

> "if at any time Congress should find any encroachment [on Federal Supremacy], it could remove the encroachment by appropriate legislation", 740 F.2d at 209 (Pet. App. A32),

turns the application of the Compact Clause on its head. If that were true, no agreement between the states could violate the Compact Clause. The Compact Clause, of its own force, expressly requires states to obtain the assent of Congress—it does not require Congress to be constantly vigilant for state encroachments on Federal supremacy. *See Cuyler v. Adams,* 449 U.S. at 439 ("the requirement of congressional consent is at the heart of the Compact Clause").

The agreement at issue enhances the power of Connecticut and Massachusetts over interstate commerce, and has not received Congressional consent. It therefore violates the Compact Clause.

CONCLUSION

The Federal system of the United States requires that Congress approve restrictions on commerce such as those in the Connecticut and Massachusetts statutes. The Congress that enacted Section 3(d) did not consider the creation of regional banking systems. Such a major reorganization of the nation's banking structure should be left to explicit Congressional approval—if that can be obtained—and not to the parochial efforts of the several states.

Respectfully submitted,

RICHARD S. SIMMONS
ROBERT F. MULLEN*
One Chase Manhattan Plaza,
New York, N.Y. 10005

Counsel for The New York Clearing House Association as Amicus Curiae

* *Counsel of Record*

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N.Y. 10005

DEBORAH S. PRUTZMAN,
General Counsel,
The New York Clearing
House Association,
100 Broad Street,
New York, N.Y. 10004

Of Counsel.

February 21, 1985

ATTACHMENT A

Connecticut Senate Debate at 60—64
(May 18, 1983)
(remarks of Senator Sullivan)

"Mr. President, before I explain the amendment, I'd like to point out to the circle that this is probably the most significant banking legislation that's come before this body, at least in my time anyway, and Mr. President, it is the result of many of the activities in the Congress, many of the reports, Presedential [sic] reports, sent to the Congress and some of the actions of the Congress more particularly the banking committee and the Congress of the United States wherein they've left banking interstate up to the states, more or less, or regions, and the reason for this, Mr. President, was that the Congress in its wisdom saw the great harm that it could do to banking and the financial industries in this country were they to pass some all-sweeping legislation in regard to opening up banking throughout the United States wide open. Some of the reasons for this, Mr. President, were more particularly the case here in the New England region where we are contiguous to big financial centers in New York where some of the banks in New York dwarf us—make our banking institutions look like midgets. Some of them like City Corps, which is probably a hundred twenty-two or a hundred and twenty-three billion dollars as compared to our largest bank in Connecticut which is something in excess of five billion. If you were to put all of our banks together, Mr. President, all of them together including savings and loans, mutuals, trust companies including credit unions, we probably would be twentieth or twenty-first in the list in the financial picture in New York, so that gives the circle an idea of how large the banking center in New York is, and to open our doors up completely throughout the United States would reek [sic] havoc, at least in the Committee's eyes, on the financial institutions of Connecticut. New England is peculiar in that it has probably one of the strongest mutual savings bank industries in the country. There are not too many mutual savings

banks throughout the country. In certain regions there are, but most of them are concentrated here in New England and they're a very strong and viable industry, and to just open the doors up and submit them to the onslaught of the big banks throughout the country including California, New York, etc., Chicago, would reek [sic] havoc on the industry, so what the committee did and in what we consider our wisdom was to come forth with a measure which would follow the Massachusetts bill that has passed which is a New England pact and to follow the Rhode Island pact to the extent that they have formed a, or passed a statute restricting it to New England even though they have a trigger mechanism in 1986, I think it is, which that law has passed the legislature in Rhode Island. we've come up with the measure to create a New England banking law whereas any of our institutions here in Connecticut, that is mutual savings and loans and trust companies, can acquire banks in any other New England state that has similar provisions in the law of their states as ours and vice versa, those banks can come into Connecticut and acquire our banks. Our law allows a mutual, or I mean a Connecticut Savings and Loan Association to acquire a New England Savings and Loan Association but the resulting bank will be a savings and loan association. Our law allows a Connecticut Mutual Savings Bank to acquire a New England Mutual Savings Bank or a Trust Company or a Savings and Loan Association and the resulting bank will be a mutual savings bank. Our law also allows, within the State of Connecticut, for the acquisition of a trust company or a savings and loan association by a mutual savings bank and the resulting institution will be a mutual savings bank. It also at the same time allows a merger between these various institutions stock institutions which we a couple of days ago passed a stock conversion bill for savings and loan and mutual savings banks. It allows stock institutions to merge and at the time of merger, they must indicate what type of institution will be the resulting entity which could be a trust company or a savings bank or a savings and loan association. Our law also gives the commissioner vast latitude in approving these various mergers and

purchases of assets or stock, and so the commissioner will be looking very closely at the merger that it is to take place. That's in regard to financial stability of the institution that's going to affect the merger. The commissioner also has the power to overlook the mergers of our various banking institutions within the State of Connecticut. If these terms seem boring, I have to keep mentioning them because we have these distinct banking institutions in Connecticut, that is mutual savings and loan associations and Connecticut Bank and Trust Companies who all have different powers and all these powers are granted by the State of Connecticut through statute or in the case of Federals, granted by Federal or regulation. Our law also prevents any other out-of-state bank from coming into Connecticut other than a New England Bank who has comparable law to ours, so it strictly forbids any of our banks within our state from acquiring any out-of-state bank other than a New England. It strictly forbids any New England bank from acquiring a Connecticut bank and then being acquired by an out-of-state bank outside of New England. In a case where this happens, the commissioner in Connecticut can issue a cease and desist order from that bank doing business in Connecticut. Our law also, the law that I'm putting forth today, also has provided for two out-of-state, by out-of-state I mean two banks anywhere in the United States, banks or bank holding companies, to establish two night depository offices per year in Connecticut and this is not cumulative. They may establish two per year. If they don't establish the two, then they fall by the wayside and they've got two to next year. Our law also prevents the leapfrogging provision for, as I say, a New York bank going into Maine and acquiring a Maine bank and having the Maine bank come in and acquire a Connecticut bank. The law prevents that from happening. Now, Mr. President, we spent long, hard hours thrashing out this piece of legislation and it had a majority support of the committee, not the unanimous support but the majority support, and that's indicative of the various views that were put forth in the committee during the promulgation of this legislation, and Mr. President, I want to commend the committee for the long, hard hours they put into listening to

various testimony in regards to this and, Mr. President, the main reason for this New England position is that if we were to open the doors up a big bank, and I mentioned these various banks, a large bank with a hundred billion dollar asset, could come into Connecticut and pick up two or three or four or five banks or four banks or three banks and then bring their entire marketing operation into Connecticut and a bank that size could overwhelm almost any bank we have here right now. So, Mr. President, we thought that to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking, which I have no doubt is going to come, when, I'm not sure about that, but I know in the future it will come, in order to give our banks in Connecticut time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly can so we can thwart any intervention as best we can from the large institutions and still provide the service, the loan power of the banks that we have in Connecticut today to our Connecticut consumers. As we know, many of the large New York banks have great, great investments in foreign countries and so there's a fear that they would come into Connecticut, get our deposits and invest them in foreign countries, so we've tried to the best of our ability to prevent this from happening and the result is the New England Bank, and, Mr. President, I would move adoption of this amendment and I hope it would be unanimous and I would ask for a roll call vote, Mr. President."

ATTACHMENT B

Connecticut House Debate at 287-88
(May 26, 1983)
(remarks of Representative Gilligan)

"Mr. Speaker, I rise in opposition to the amendment [that would postpone the effective date of the statute until July 1, 1984]. And I had the privilege of serving on the HEB commission and it's not quite as complicated as it would seem. What we're really addressing this afternoon is an opportunity. And the question is whether we're going to seize that opportunity this afternoon.

"There is absolutely nothing to be gained by putting this off for one year. There's everything to be gained by seizing the opportunity of getting out into the market and permitting ourselves to participate along with Massachusetts in mutually advantageous mergers to buttress the position of the local banking industry for the survival test they'll face in the very near future.

"We can't stop the forces of change, but we can manage them and we can control them and we can guide them in a way that will strengthen our local banking industry. I see absolutely nothing to be gained by delaying this until 1984. Rhode Island admittedly decided to make it effective July 1, 1984, I believe. But I see every opportunity gained by acting immediately on this issue and giving Connecticut a competitive edge.

"I don't know why anyone in this Chamber would feel otherwise. I urge rejection of the amendment."

MOTION FILED
FEB 21 1985

No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP., INC., UNION TRUST COMPANY, and CITICORP, PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

and

BRIEF OF FRANK L. MORSANI, INDIVIDUALLY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Dewey R. Villareal, Jr.
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
501 East Kennedy Boulevard
Tampa, Florida 33602
Counsel of Record

February 21, 1985

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 36.3 of the Rules of this Court, Frank L. Morsani, by and through his undersigned attorneys, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., respectfully seeks leave to file the attached brief as *amicus curiae* in support of petitioners. The consent of counsel for petitioners has been granted; the consent of counsel for respondents has been withheld.

Amicus is Frank L. Morsani, taking a position as a small businessman and private citizen and borrower from multiple banking institutions. *Amicus* is Vice Chairman of the Board of the United States Chamber of Commerce and was past Chairman of the Council of Small Business of the United States Chamber of Commerce but *amicus* emphasizes that he is not taking a position as a member or officer of the United States Chamber of Commerce.

Amicus is a principal in several business entities having multi-state activities primarily, but not exclusively, in the Southeastern portion of the United States.

While *amicus* is a Florida small businessman and not directly affected by the Connecticut and Massachusetts' statutes, all bank customers or shareholders in similar positions will be affected and will have an interest in the outcome of the litigation. *Amicus* is a Florida resident and Florida has enacted a statute which basically allows only the old Confederacy to join its banking forces. Fla. Stat. §658.295 (1984). If exclusive banking regions are encouraged a banking structure will be created and governed by narrow state interests, subject to the worst influences of pork barrel, local interest lobbying and economic isolation pressures, and not by the general marketplace competitive forces. Without such competition bank customers will be adversely affected. Without the widest possible permissible state interaction between banks, efficiency will be sacrificed and costs will rise. Such costs will be passed along to the bank customer.

For small banks, competition for acquisition is an incentive to efficiency of performance and to the widest diversity of market and penetration of market. Enhancement as a target bank is sought by banks when acquisition opportunities abound. The small businessman such as *amicus* benefits from this incentive competition because his business is sought by the target banks to help the enhancement effort and to spread the cost of operations. Congress has always encouraged competition. The Connecticut and Massachusetts statutes discourage competition by the creation of an irrational, uneconomic and noncompetitive bank acquisition structure.

Obviously, regional banking compacts and their effects are not confined to Connecticut and Massachusetts. As the Southeastern region of the United States continues to grow by leaps and bounds, interstate banking is more important today than ever before. The region of direct consequence to *amicus* is the Southeast and the problem of regional banking hinders the forward movement of this area.

The banking industry is now artifically restricted by state borders. Lack of competition in the Southeast region will retard national growth. If the restrictions are loosened and the scope of the financial community is broadened, a growth spurt, led by small businesses given access to increased credit opportunity, will be unleashed which will benefit the entire United States.

Small business depends on commercial banks as the principal providers of funds for growth, marketing and development. Small business grows in direct relation with the manner it addresses its competition. Yet banks in parts of the United States are not permitted to cross state lines except arbitrarily. Such isolation insulates these banks from competition. Lack of competition, in turn, allows banks to make unreasonable demands upon the small businessmen who cannot reach the national money market. Lack of allowable competition prevents the incentive or necessity for the established out-of-state banking industry to tend to the needs of the small business community geographically remote.

Local banks at times are hard pressed to meet the needs of small business. Local small business people may be deprived of the many services out-of-state banks offer. The consequences of being unable to achieve access to the national money market are acutely felt by small businesses especially during periods of tight credit. Furthermore, due to a local bank's desire to avoid establishing a high line of credit with any one individual business, the small businessman may be limited to a local bank, and further hampered in his quest to prosper. Any attempt to restrain banking, as this issue does, will affect both the internal growth and external acquisitions of *amicus* and other entrepreneurs.

Because of the foregoing, *amicus* has a strong interest in the outcome of this litigation. Thus, *amicus* urges the Court to reverse the Second Circuit's interpretation of the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §1842(d). Attached is the *amicus* brief designed to further clarify the issues and to clarify the practical problems created if the Connecticut and Massachusets statutes are upheld.

Respectfully submitted,

Dewey R. Villareal, Jr.
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
501 East Kennedy Boulevard
Tampa, Florida 33602

February 21, 1985

QUESTIONS PRESENTED

This amicus brief will discuss the following questions:

1. Whether the Connecticut and Massachusetts statutes limiting bank holding company acquisitions are unconstitutional because the Douglas Amendment does not expressly authorize the states to discriminate against one another.

2. Whether an invalid multi-state compact was created by the Massachusetts and Connecticut legislation without congressional approval per the Compact Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-363

NORTHEAST BANCORP., INC., UNION TRUST COMPANY, and CITICORP, PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FRANK L. MORSANI, INDIVIDUALLY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

As explained in the foregoing motion, Frank L. Morsani, an individual small businessman, has a vital interest in the outcome of the present litigation. The type of legislation at issue will result in higher costs, less efficiency and will distort and limit competition for bank acquisition. Banks and small businessmen will be adversely affected by the lack of competition for bank acquisition which encourages bank performance in dealing with customers. If the Connecticut and Massachusetts statutes are upheld, similar statutes are likely to be enacted leading to suppression of the American banking industry and limitation of competition.

STATEMENT OF THE CASE

For purposes of brevity, *amicus* will adopt by reference the Statement of the Case presented by the Petitioners.

SUMMARY OF ARGUMENT

The states cannot restrict the flow of interstate commerce in a discriminatory manner unless Congress has unmistakably by express statement provided the states with specific authority. The Douglas Amendment does not expressly provide such authority. The Douglas Amendment only provides authority for the states to permit out-of-state bank acquisition or deny out-of-state bank acquisition. The Douglas Amendment does not expressly allow selective discrimination of out-of-state bank acquisition.

Simple protectionistic state statutes which provide for other than evenhanded regulation should be stricken as invalid *per se* under the Commerce Clause unless the Congress has expressly allowed such discrimination. The Douglas Amendment does not allow such discrimination.

The Douglas Amendment should not be interpreted to provide for state restrictions on bank holding company activities. The Douglas Amendment only authorizes the states to permit out-of-state acquisition of local banks.

The Massachusetts and Connecticut statutes are part of a plan that creates a regional banking system which isolates the member states from the national banking community. The compact's effect is to enhance the sovereign powers of the member states to the potential detriment of federal supremacy. Absent explicit congressional approval, the compact violates the Compact Clause of the United States Constitution.

ARGUMENT

I. The Connecticut And Massachusetts Statutes Are Unconstitutional Because The Douglas Amendment Does Not Expressly Authorize States To Discriminate Against One Another.

Under the Commerce Clause, power to regulate commerce among the several states is vested in Congress. It is well settled that Congress may use its powers under the Commerce Clause to confer upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). There must be an "express statement" of congressional policy prior to finding that state regulation/discrimination is permissible. *South-Central Timber Development, Inc. v. Wunnicke*, _____ U.S. _____, _____, 104 S.Ct. 2237, 2242 (1984). In *South-Central*, this Court stated "there is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirements that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Id.*

Only two positions are expressly stated and unmistakably clear in the Douglas Amendment (the "Amendment"). Initially, the Amendment expressly states that no out-of-state bank application for a state bank acquisition shall be approved. Clearly a state may, by omission, prevent all out-of-state bank holding company acquisitions of its local state banks. By way of exception, the Amendment provides for the specific authorization by state statute local state bank acquisitions by out-of-state bank holding companies. Clearly, a state may allow all out-of-state bank holding company acquisitions of its local state banks by statute. This dichotomy, prevent or permit, is the only unmistakably clear statement of Congress that can be gleaned from the Amendment.

It is impossible to discern that Congress made an express statement which unmistakably and clearly gave the states the

right to pick and choose which out-of-state banks should be allowed the privilege of acquisition. A logical extension of the Connecticut argument would allow a state to prevent the acquisition of some of its banks while allowing the acquisition of other of its banks. For example, the Douglas Amendment does not expressly allow Florida to enact a statute allowing the out-of-state bank acquisition of Dade County banks while preventing out-of-state bank acquisition of other Florida county banks. It is absurd to suggest that Congress intended to confer upon the states such discriminatory powers.

This Court has, in matters concerning express deference under the Commerce Clause, upheld state statutes which authorize evenhanded regulation while striking, under a virtual *per se* rule of invalidity, other statutes authorizing protectionistic discrimination. *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). The New England states in this case have not presented evenhanded statutes for review. Their statutes are precisely the type of simple economic protectionism and discrimination regularly stricken as invalid *per se* absent an unmistakably clear statement of Congress allowing the discrimination and protection.

In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) this Court determined that the language of the Amendment does not authorize state restrictions of any nature on bank holding company activities. The Amendment does establish a general federal prohibition and grants the states the authority to permit expansion of banking across state lines. *Id.* at 47. The New England statutes in issue permit selective expansion across state lines, an act which is not clearly authorized by Congress, and act which constitutes direct state restriction on certain bank holding companies contrary to the holding in *Lewis*.

The Amendment, as stated in *Lewis*, was a permissive enactment. *Id.* It was not a complete renunciation of all federal terest in interstate banking acquisition. In the Amendment, Congress did not even discuss the question whether states should have the power to discriminate among out-of-state

banks. The Federal Reserve Board erred in finding a renunciation and complete deferral to the states by Congress. There is nothing in the legislative history of the Amendment to suggest that Congress considered potential discrimination, let alone that Congress specifically, clearly, and unmistakably authorized such discrimination. Congress intended to defer only to valid state laws. *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Congress has maintained Federal supervision and control over the development of bank holding companies. The Commerce Clause's proscriptions have not been deferred by Congress so as to allow the states to ignore irrationally and arbitrarily the economic isolation and protectionism prohibitions of the Commerce Clause and other constitutional safeguards. As this Court has recently stated in two separate cases:

> "It is...beyond doubt that the Commerce Clause itself furthers strong federal interest in preventing economic Balkanization."

Bacchus Imports, Ltd. v. Dias, _____ U.S. _____, _____, 104 S. Ct. 3049, 3053 (1984);

> "The Commerce Clause was designed 'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.' "

South-Central Timber Development, Inc. v. Wunnicke, _____ U.S. _____, _____, 104 S.Ct. 2237, 2242 (1984).

II. The Connecticut And Massachusetts Statutes Are Unconstitutional Because They Are An Unauthorized Interstate Compact In Violation Of The Compact Clause Of The United States Constitution.

This Court has long recognized the Compact Clause as requiring congressional authorization of any agreement or compact among the states which tends to increase the states' political power or which encroaches upon the welfare of the Federal union. *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976). In *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), this Court expressly recognized that potential, rather than actual, impact upon Federal supremacy is the standard by

which challenges under the Compact Clause must be measured. *Id.* at 472. Under this standard, the New England Banking Compact created by the Massachusetts and Connecticut legislation is precisely the type of arrangement that requires Congressional authorization under the Compact Clause.

In *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854), this Court had included within the umbrella of Federal supremacy the need to "guard the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others." *Id.* at 494. The New England Banking Compact potentially encroaches upon and interferes with Federal supremacy since, through the Douglas Amendment, Congress only expressly deferred to the states the authority to permit interstate banking acquisitions. Because Congress did not specifically permit state discrimination against out-of-state entrants, however, the New England Banking Compact at least potentially encroaches the Constitutional and congressional mandate against discrimination in interstate commerce and therefore must be congressionally authorized. Because Congress has neither considered nor approved the New England Banking Compact, the Massachusetts and Connecticut statutes at issue herein should be held invalid and of no force and effect.

A practical effect of the New England Banking Compact is the creation of an artificial barrier that isolates the member states' banking institutions from the national banking markets. As a consequence, non-member states will be forced to retaliate by establishing similar banking regions to protect their banking institutions and constituents. The resulting revival of an economic Confederacy to combat an economic New England is neither the goal of the Douglas Amendment nor is it a lawful option under the Compact Clause.

CONCLUSION

The judgment below should be reversed.

Respectively submitted,

Dewey R. Villareal, Jr.
Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.
501 East Kennedy Boulevard
Tampa, Florida 33602
Counsel of Record

No. 84-363

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF BOB GRAHAM, GOVERNOR OF FLORIDA AND GERALD A. LEWIS, COMPTROLLER OF FLORIDA IN SUPPORT OF RESPONDENT AND INTERVENOR-RESPONDENTS

Of Counsel:
JAMES E. EATON
S. CRAIG KISER
CARL B. MORSTADT
KENNETH J. MUSZYNSKI
PAUL STADLER
Office of the Comptroller
The Capitol, Suite 1301
Tallahassee, Florida 32301
(904) 488-9896
For Gerald A. Lewis, Comptroller

J. THOMAS CARDWELL *
ANNE L. McGIHON
AKERMAN, SENTERFITT & EIDSON
10th Floor CNA Building
Post Office Box 231
Orlando, Florida 32802
(305) 843-7860

and

SYDNEY H. McKENZIE III
General Counsel to the Governor
The Capitol
Tallahassee, Florida 32301
(904) 488-3494
Attorneys for Governor Bob Graham

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF BOB GRAHAM, GOVERNOR OF FLORIDA AND GERALD A. LEWIS, COMPTROLLER OF FLORIDA IN SUPPORT OF RESPONDENT AND INTERVENOR-RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the citizens of Florida by Bob Graham, Governor, and Gerald A. Lewis, Comptroller. On May 22, 1984, Governor Graham signed into law Florida Statute 658.295, the Regional Reciprocal Banking Act of 1984 ("Florida Regional Act"). This Act becomes effective July 1, 1985, and authorizes out-

of-state bank holding companies within a defined region to acquire banks and bank holding companies in Florida if the laws of the other state extend the same right to Florida bank holding companies. One transaction pursuant to the Act has been approved by federal and Florida regulatory authorities and is being challenged in the Second Circuit Court of Appeal.[1]

The decision in this case will likely be dispositive of the constitutional issues raised in the challenge to the Florida statute. The State of Florida has a vital interest in its banking system. The Florida Regional Act is of major importance to the structure and development of banking in the state and of direct interest to its citizens.

CONSENT OF THE PARTIES

All of the parties to this action have consented to the filing of this brief. The written consents are filed or will be filed as soon as they are received.

SUMMARY OF ARGUMENT

Florida's Regional Reciprocal Banking Act of 1984 is *not* a matter of "simple economic protectionism."[2] It is a progressive statute that lowers the federally imposed barriers to interstate banking.

For over 200 years this country sought to create a decentralized banking system. The reasons for doing so remain valid today. The regional concept is a sound and logical approach by states to accommodate the banking structure created by our past history to changing con-

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[1] Sun Banks, Inc. and Trust Company of Georgia, Florida and Georgia bank holding companies, respectively, have agreed to a regional interstate merger. Federal Reserve Board approval of that merger has been appealed, *Citicorp v. Board of Governors*, No. 85-4009 (2d Cir. filed Jan. 15, 1985). Proceedings have been abated pending decision in this case.

[2] Brief for the Petitioner Citicorp at 32.

ditions. It is consistent with, and authorized by, current federal bank legislation and does not impermissibly interfere with interstate commerce.

Regional reciprocal interstate banking statutes will promote the growth and diversity of competitive major financial institutions while at the same time preserve the advantages of our decentralized banking system. Congress intended states to have the right to regulate the structure of their own banking systems. If they may not do so, the banking system, and the nation, will be exposed to the risks associated with concentration of resources in a few large institutions. These risks will be increased without any significant advantages to the public.

ARGUMENT

I. THE BACKGROUND FOR THE ENACTMENT OF THE FLORIDA REGIONAL RECIPROCAL BANKING ACT.

A. Decentralization of U.S. Banking System.

Decentralization has been a fundamental principle of banking policy in the United States. Going back to its founding, this country has had a healthy skepticism of the aggregation of economic power in the hands of a few. As put by Richard F. Syron, Senior Vice President and Economic Advisor to the President of the Federal Reserve Bank of Boston:

> "[T]he United States has a history of two centuries of populist concern about large financial institutions. Over the years, people have worried about how interstate banking might affect the concentration of political and economic power, the distribution of credit, the capital adequacy, safety, and soundness of our financial structure and the role of the dual banking system." [3]

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[3] Syron, *The New England Experiment In Interstate Banking*, New England Economic Review, pp. 5, 7 (March/April 1984).

This concern over concentration of economic resources caused both the state and the federal governments to adopt statutes and regulations designed to restrict bank expansion.

States fostered decentralization by limitations on bank branching. Some states allowed no branching, and others limited branching to city or county boundaries. The result was to promote a larger number of local banks by restraining statewide growth of a few dominant institutions.

Decentralization was also a federal policy. Both the McFadden Act, 12 U.S.C. § 27, and the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.* ("BHCA"), were enacted to promote decentralization. The McFadden Act made national banks subject to the same restrictions on branching as were state-chartered banks. Interstate branching was not authorized.

The use of bank holding companies grew in order to evade restrictions of the McFadden Act and other laws intended to prevent concentration.[4] When Congress enacted the Bank Holding Company Act of 1956, one of its principal objects was to halt the evasion of the purposes of the McFadden Act and promote local control of banking institutions. This was made clear in the House Report accompanying H.R. 6227:

> "Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the various precepts upon which our banking system rests. The United States early in its history, it should be recalled, adopted a

---

[4] "Bank holding companies were for a time a means for circumventing the restraints imposed by state laws and the McFadden Act. If a bank could not have a branch somewhere within its own state—or outside of the state for that matter—it could use a holding company as a vehicle to acquire an existing organization or to establish a new bank." Syron, *The New England Experiment In Interstate Banking*, New England Economic Review, pp. 5, 7, (March/April 1984).

> democratic idea of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. It has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the community's industrial and commercial activities and from the farming population within its vicinity or trade area. Its activities are usually fully integrated with the local economic and social organization. The bank holding company device threatens to destroy this democratic grassroots institution.
>
> Your committee believes that the destruction of the American unit banking system, resulting in the further concentration of credit facilities, would have revolutionary effects upon our free-enterprise system. Ultimately, monopolistic control of credit could entirely remold our fundamental political and social institutions." [5]

The BHCA put into place restrictions on the growth of bank holding companies in two ways. First, it made them subject to the state laws and rules as to expansion. A state has the right to decide whether or not it will even have holding companies and if so, the extent to which they may expand geographically within the state. States thus control their intrastate banking structure.

Second, the BHCA prohibits acquisitions by bank holding companies across state lines. This prohibition, contained in 12 U.S.C. § 1843(d), is known as the Douglas Amendment. The federal policy is a blanket prohibition. A state may, however, at *its* option, permit interstate acquisition within its borders. States are thus expressly permitted the right to determine for themselves whether they will permit interstate expansion into their jurisdiction.

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[5] H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2 (1955).

The policy of decentralization succeeded. As a result of federal and state regulation, there are over 14,000 commercial banks in the U.S. This contrasts with 11 in Canada, 35 in the United Kingdom, 86 in Japan, and 206 in France.[6] In terms of deposits, the American banking system is far less concentrated than that of other countries. In the U.S., the share of deposits of the five largest banks is less than 20% of the national total. In Canada, the top five hold over 77% of the deposits, in France over 76%, in West Germany over 61%, and in the United Kingdom over 56%.[7]

The so-called "balkanization" [8] of the banking system is, in fact, a product of a conscious national policy going back 200 years. It is not produced or exacerbated by regional reciprocal laws of the sort enacted by Florida and other states, but rather it is alleviated by them.

B. The Development of Florida Banking.

Florida's banking system is a product of the policies described above and its own economic history. Florida's economy was devastated by the Civil War.[9] In 1870, capital invested in manufacturing was estimated at $1,700 and the number of persons employed at 2,750.[10] Its banking system was nonexistent. Until 1880, Florida had only one national bank and three state-chartered banks.[11] This compares with 88 banks in New York City alone.

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[6] Syron, *supra* at 6.

[7] Syron, *id.*

[8] Brief for the Petitioner Citicorp at 6.

[9] Journalist Whitlaw Reid observed that "The country contained little more than is needed for the sustenance of the inhabitants. Trade may come by and by, when Florida begins to be used again as a national sanitarium . . . ." Dovell, *History of Banking in Florida, 1828-1954* (1955) 59-60.

[10] Dovell, *id.* at 61.

[11] Dovell, *id.* at 74-75.

Despite its slow beginnings, Florida's banking system has matured rapidly. At the end of 1983, total deposits in commercial banks exceeded $55 billion. While this represents tremendous growth, Florida institutions are miniscule compared with the size of some so-called "money center" institutions. The deposits of *each* of the three largest U.S. commercial banks exceed the deposits of *all* commercial banks in Florida.[12]

In 15 years, it is predicted that Florida will be the third largest state in population, behind only Texas and California. While other states have been centers of commerce for many years, Florida has only recently begun to evolve into economic maturity. Its banking system starts from a point tremendously behind those of other states in terms of size and scope. In 1983 the largest bank holding company in Florida had assets of 7.3 billion dollars. By comparison New York had six bank holding companies each of whose assets were over *five times* that figure.[13]

II. THE RATIONALE BEHIND THE FLORIDA REGIONAL RECIPROCAL BANKING ACT.

A. The Reasons For Change.

Market forces, not legislators or regulators, are the driving force behind changes in banking. Technological development has made it possible to instantaneously transact banking business over great distances and at many locations simultaneously.[14] Demographic changes

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[12] The largest commercial bank in the United States, The Bank of America, in June 1983, had total deposits of $94,823,190,000; followed by Citibank, N.A., with deposits of $75,539,000,000 and Chase Manhattan Bank, N.A., with deposits of $57,722,612,000. *Bankers Desk Reference 1984* (E. Cox ed. 1984) 215.

[13] Joint Appendix F at A25.

[14] For example, automatic teller machines can permit remote cash dispensing and deposit taking. Funds may be transferred across the country by electronic impulse through wire transfers. Home computers may be used to directly access bank deposits.

give impetus to institutions in slower growing or stagnant markets to seek ways to engage in business in more rapidly growing areas. For the legal and historical reasons discussed, these market forces are operating on state banking systems that are tremendously disparate in size, structure and maturity.

In December 1983, Governor Bob Graham appointed a blue ribbon committee to study the issue of interstate banking. In his statement appointing the committee he said:

> "The proliferation of non-traditional banking institutions, the advent of electronic banking and other aspects of deregulation of the financial services industry all point in one direction: national interstate banking will soon be a reality. The questions for Florida are what kind of financial marketplace do we want to have after this occurs and what changes in our state's banking laws will be most beneficial in bringing about the environment we seek.
>
> * * * *
>
> The states in this region should seriously consider adopting reciprocal banking legislation which would allow the expansion and ultimate survival of major southern banking institutions in the evolving financial services industry." [15]

The Committee recommended such an approach [16] and a regional interstate bill was introduced with the support of the Governor and Comptroller Gerald A. Lewis. After extensive debate and consideration of alternatives, the Florida Regional Banking Act of 1984 became law.

B. The Reasons For The Regional Reciprocal Approach.

Both Congress and the courts have recognized that each state has a strong interest in shaping its own financial

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[15] Press Release of Governor Bob Graham (December 1, 1983).

[16] *Report of the Committee Appointed by the Governor of Florida to Examine the Implications for Florida of Regional Interstate Banking*, Joel R. Wells, Jr., Chairman, February 10, 1984.

structure.[17] Florida's choice to use the regional reciprocal approach was a logical and reasonable one consistent with the purpose and intent of the Bank Holding Company Act to permit states to make the important choices about their banking structure.

First, significant financial institutions with roots in the state are desirable. Banking is essentially a local business. The relevant market in which most savers, borrowers and banks meet may be approximated by a metropolitan area or a rural county.[18] The closer those ultimately responsible for the bank's operation are to the community that the bank serves, the more responsive it will be.[19]

A developing state such as Florida needs to have significant financial institutions that are indigenous to the state.

> "[T]he *regional interstate banking approach can be expected to be responsive to regional economic needs*

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[17] See Bell & Wilmarth, *The Interstate Banking Controversy: Prseident Carter's McFadden Act Report*, 99 Banking L. J. 722, 731 (1982) (hereinafter cited as Bell & Wilmarth).

[18] For discussion of this concept, *see United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

[19] In the debate on the Bank Holding Company Act of 1956, this was a crucial point:

> "It is hard to believe that a branch of a gigantic corporation, with its headquarters many miles away will have the sympathetic understanding of the needs of a community as does the local bank which is so definitely a part of the community life." 101 Cong. Rec. A 2454 (1955) (remarks of Rep. Wier).
>
> "[W]hat this bill is designed to attack, and to rectify, is the situation under which decent American citizens far removed from your town and my town, completely unfamiliar with the economies of our communities and not a bit interested except for the dividends that can be siphoned out of them can control our banks and the source of credit in our communities; they have the power—if they have the resources—to make decisions affecting the life blood of our local economies." *Id.* at 8030 (remarks of Rep. Rains).

and development. This expectation is based upon the fact that asset and liability sources of regional banks are more interdependent, vis-a-vis the asset [and] liability sources of money center banks . . . .

[A]sset allocation criteria would necessarily be more responsible to the region in which these banks operate." [20] (Emphasis supplied.)

Second, the Florida banking system is maturing. It has reached a point where growth is limited by the size of the Florida market. The larger bank holding companies may not make further significant acquisitions without encountering antitrust obstacles. The effect is to limit the growth of institutions in the state. The regional reciprocal concept permits the development of significant financial institutions where the economies of individual states alone will not support such large institutions. Regional reciprocal laws are a way for a state that does not have the economic resources within its own borders to have the possibility of having major financial institutions centered within it.

The opponents of regional reciprocal banking attempt to perpetrate the fallacy that it is intended to be restrictive. The opposite is true. It is intended to open and expand markets. It increases competition and decreases the existing barriers to bank expansion. For this reason it is opposed by giant banking organizations such as Petitioner Citicorp and amicus Chase Manhattan Corporation. In a recent submission to the Federal Reserve Board, Citicorp made it clear it opposed regional interstate mergers on competitive grounds.[21]

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[20] Frieder, *An Orderly Transition To Interstate Banking*, The Bankers Magazine, V. 164, No. 2, March/April 1981, 47 at 52.

[21] Citicorp opposed the proposed regional interstate merger between Sun Bank, Inc. of Florida and Trust Company of Georgia. See fn. 1. Citicorp requested the Federal Reserve Board to stay its approval of the merger arguing it would be "irreparably harmed" because of "(1) the loss of desirable potential acquisition partners, and (2) the loss of customers and revenue to the combined entity due to the increased capital base, multistate banking presence, increased credit and service capabilities and name recognition advantages obtained by the combined entity as a result of the transaction." Letter from J. Quinn, on behalf of Citicorp, to William Wiles, Secretary, Board of Governors of the Federal Reserve System (January 28, 1985).

A third factor motivating the regional reciprocal law in Florida is the genuine community of economic interests of the region. The states of the Southeast share a common history and a common economic development. The Civil War decimated their economies. Revitalization and growth of the entire region was extremely slow. The political, economic and social histories of the states of the southeastern region are bound together, as are histories of other states in regions throughout the nation.

The process of integration of the diverse financial systems of various states should be done in an orderly fashion. Lifting the federally imposed barriers as to those states sharing a common history and similar economies is a logical and reasonable way for states to go about exercising the local control over their banking systems that Congress intended when it enacted the BHCA and more particularly the Douglas Amendment.

State banking systems are vastly different in size, structure, and maturity. It is not realistic to believe that these limited banking systems, which are the product of past federal policy, can be instantaneously incorporated and amalgamated into a system of interstate banking without doing serious violence to the objectives of the federal and state laws that created them.

The Florida Regional Banking Act of 1984 should be viewed in positive terms. It reduces existing geographic restrictions put into place by federal law by allowing integration of the state's financial system with those of similar structure in a manner that accommodates the historical disparity in size and banking structure among

states. It carries forward those important policies of the BHCA of local control over bank structure and concern over the concentration of financial resources.

III. THE FLORIDA REGIONAL RECIPROCAL BANKING ACT CARRIES OUT THE PURPOSES OF THE BANK HOLDING COMPANY ACT.

Petitioners and others opposing the regional reciprocal concept attempt to characterize themselves as being the victims of protectionist legislation and the public as being deprived of advantageous competition.[22] The fact is, however, that the position urged by Petitioners will serve their own self-interest by restricting the growth of competitive institutions.

Petitioners wish to force states into the position of making one of two choices. They may do nothing and maintain the total prohibition against interstate acquisition in the current federal law.[23] Alternatively, they may allow entry on a nationwide reciprocal basis.[24] Both alternatives deprive states of the right to fashion their own resources to banking needs and promote increased concentration of resources in a few banks, all contrary to the purpose and intent of the BHCA.

A. Effects Of Continuing the Interstate Restrictions of the Douglas Amendment.

The invalidity of regional arrangements would deprive the state of the ability to experiment with and to fashion a financial system tailored to meet its particular needs

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[22] Brief for the Petitioner Citicorp at 32.

[23] Florida's Regional Act becomes void in its entirety if any part relating to the condition of entry is declared void. *Fla. Stat.* § 658.295(7) (1984).

[24] It is not clear that even reciprocity would be a legitimate part of a statute under Petitioners' position. If any discrimination is an impermissible burden, then even a reciprocal requirement would not pass constitutional muster.

at this specific time. Florida, and the other states adopting regional statutes, have made careful decisions about what they believe to be in the best interests of the state and its citizens. They will be prevented from implementing these decisions. The purpose and the vitality of the dual system of banking will be frustrated by depriving the states of their ability to engage in evolutionary and innovative bank structural reform.

Significant regional institutions will have to develop through mergers and acquisitions.[25] Institutions restricted to one less developed state will not have the market base to grow substantially and antitrust considerations will restrict intrastate growth. If regional banking statutes are held invalid and the state does not lower all its barriers to interstate acquisitions, then it will be relegated to banking institutions that cannot realistically be expected to ever achieve more than a fraction the size of the existing money center institutions.

B. The Effects of Unrestricted Bank Acquisitions.

Should a state such as Florida desire to promote the growth of regional financial institutions by permitting out-of-state entry, it presumably could do so only on an unrestricted basis. The consequences of such unrestricted entry are contrary to the aims and policies that underlie the Bank Holding Company Act.

Since the principal method of interstate expansion will be by acquisition and not by de novo entry, the result will be a replacement of competitors rather than addi-

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[25] "Past evidence has shown that acquisition rather than de novo entry is the preferred method for [bank holding company] expansion. For example, between 1968 and 1977, multibank holding companies obtained over eighty percent of their new bank subsidiaries by acquisition, while less than twenty percent of such subsidiaries were organized as de novo banks." Bell & Wilmarth, *supra* note 10, at 722, 725-27, citing Halbrook & Savage, *Interstate Commercial Banking: The Antitrust Issues*, 98 Banking L. J. 747, 751 (1981).

tional competitors. The largest institutions will be the acquirers. Studies show that the removal or relaxation of interstate restrictions on a national level would substantially increase concentration of banking resources because the largest banks would be in the best position to make acquisitions.[26]

Because of the tremendous disparity in size between institutions in Florida and in the money centers, it is obvious who will be the acquirer and who will be the acquired. In any scenario of immediate national interstate bank acquisitions, the inevitable result will be acquisitions of existing bank holding companies in other states by the larger money center institutions.[27] It has been suggested that the consequence of unrestricted interstate entry would be "a *complete disappearance of major regional banks* within some of the high growth states." [28] (Emphasis supplied.)

Unrestricted interstate acquisitions will increase concentration of significant resources in the hands of a few institutions. The largest institutions will tend to get much larger by acquiring their significant but smaller competitors. The trend will be toward a centralized banking system. In those countries whose policies permit a

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[26] Solomon & Savage, *Competition and Concentration in Commercial Banking*, contained in the Appendix to *Geographic Restrictions on Commercial Banking in the United States: The Report of the President*, (1981) Ch. 2, p. 50. See Rhoades, *Concentration in Local and National Markets*, Economic Review, p. 28 (March 1985). (Publication by the Federal Reserve Bank of Atlanta, article by Stephen A. Rhoades, Chief of the Financial Structure Section of the Board of Governors of the Federal Reserve System.)

[27] The most effective way for a bank holding company to expand into Florida is to acquire a large Florida bank holding company. This gives it an instantaneous presence, staff, existing deposits and loans. It also deprives Florida and the Southeast of an existing indigenous institution.

[28] Heggestad & Wolken, *Mergers and Acquisitions in Commercial Banking: Economic and Financial Considerations*, (1980) (unpublished manuscript).

centralized banking system, the concentration of deposits in just a few institutions has inevitably occurred. Thus, the three largest banks in Canada, France, West Germany, and the United Kingdom hold between 42% and 47% of their respective nation's commercial banking deposits. By contrast, the ten largest banks in the United States hold only 18% of the United States domestic commercial bank deposits.[29]

As deposits become more concentrated, and the system becomes dominated by a very small number of very large banks, the risks to our economic system by the failure of any of those institutions becomes much greater.[30] The recent experience with Continental Illinois Bank is illustrative of that fact.

> "*The greatest problem with increases in concentration of control by the very largest banks would be an increase in the risk exposure of the banking system.* It is extremely difficult to predict when and which banks will encounter major financial stress. They are all highly leveraged and must take great risks in their normal business activities. . . .
>
> The larger the bank that is exposed, the greater the potential impact on public expectation on the soundness of the system. Since the system is basically run on public trust, *we must be careful to keep banks to a size where we can tolerate failures, even those of the very largest.*" [31] (Emphasis supplied.)

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[29] Bell & Wilmarth, *supra* note 10, at 722, 736.

[30] "[T]here is cause for concern that large banks have become more risky, and their demise may affect the stability of the banking system." Eisenbeis, *Interstate Banking's Impact upon Financial System Risk*, Economic Review, pp. 31, 34 (March 1985). (Publication by the Federal Reserve Bank of Atlanta, article by Robert A. Eisenbeis, Wachovia Professor of Banking at the University of North Carolina, Chapel Hill.)

[31] Dr. Arnold A. Heggestad, Director, Financial Institutions and Monetary Policy Center, University of Florida, Statement before U.S. House of Representatives Committee on Banking, Finance and Urban Affairs (May 10, 1984).

The policy of decentralization of banking that has been our national policy as embodied in the BHCA is well served by the regional reciprocal approach. Such laws will promote stability in the banking system by permitting the growth of major regional institutions that will spread risk and increase the system's tolerance of bank problems.

It has been suggested that regional banking arrangements deprive the public of needed competition and therefore better services and lower prices. Consolidation of the banking system by national interstate acquisition will inevitably result in fewer and larger institutions.[32] There will therefore be less, not more, competition. Beyond the strictly competitive aspects, larger banks simply do not have economies of scale that permit them to deliver services at a lesser price. Studies show the exhaustion of the economy of scale for larger institutions.[33]

> "For basic banking services, large potential entrants seem to have few cost advantages over existing banks. They would be unable to offer basic services at lower prices or to pay higher interest on deposits in markets that were already competitive." [34]

The assertion of public benefit from interstate acquisitions is inconsistent with experience.

The ultimate beneficiaries of the invalidity of regional reciprocal statutes will be those large institutions that challenge them. Without regional reciprocal banking arrangements, states are confronted with the choice of either maintaining the current federal restrictions or,

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[32] See note 27, *supra*.

[33] "Recent studies of banking firms suggest that the average cost curves of banks tend to be U-shaped and that most economies of scale are exhausted when banks reach a deposit size and range of $25 million to $50 million." Heggestad & Wolken, *supra* at 14-15.

[34] King, *Interstate Banking: Issues and Evidence*, 69 Economic Review 40 (1984).

alternatively, engaging in an interstate acquisition game in which, at least in Florida, the results are quite clear. Given the tremendous size and resource differences national reciprocity is a one-way street.

The Bank Holding Company Act clearly intended and does grant states the right to make their own choices with respect to the manner in which interstate banking is allowed, if at all. Given the historical and legal background, the regional reciprocal approach is eminently logical and reasonable, a fact which the Petitioners and amici curiae themselves recognize.[35]

CONCLUSION

The Florida Regional Act is a proper exercise of the states authority over its banking system. It is a positive step that relaxes the prohibition on interstate banking imposed by the federal Bank Holding Company Act. Florida, and the other states enacting regional reciprocal banking statutes, are playing precisely the role that Congress intended. Florida's statute is a reasoned and reasonable response to change in our economy. The efforts to invalidate the regional concept are by those who fear the growth of competition. Florida's regional reciprocal statute is not economic protectionism but rather a loosening of federal restrictions that is fully consistent with

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[35] Citicorp Vice Chairman Hans Angermuller in a speech before the Florida Economic Club, Tallahassee Florida, March 29, 1984, stated with respect to a regional bill which would trigger to national interstate reciprocity at a fixed time ". . . we're ready to accept a consolidation period . . . as a *reasonable approach for the Florida market.*" (Emphasis supplied.) Robert R. Douglas, Executive V.P. of amicus Chase Manhattan Corporation said in a letter to Gov. Graham dated January 17, 1984: "The so-called regional compact approach can be a *legitimate transitional step . . .*" (emphasis supplied) to national reciprocity.

the intent of Congress and the provisions of the Bank Holding Company Act.

For the reasons set forth above, the judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

Of Counsel:
JAMES E. EATON
S. CRAIG KISER
CARL B. MORSTADT
KENNETH J. MUSZYNSKI
PAUL STADLER
Office of the Comptroller
The Capitol, Suite 1301
Tallahassee, Florida 32301
(904) 488-9896
For Gerald A. Lewis, Comptroller

J. THOMAS CARDWELL *
ANNE L. MCGIHON
AKERMAN, SENTERFITT & EIDSON
10th Floor CNA Building
Post Office Box 231
Orlando, Florida 32802
(305) 843-7860

and

SYDNEY H. MCKENZIE III
General Counsel to the Governor
The Capitol
Tallahassee, Florida 32301
(904) 488-3494
Attorneys for Governor Bob Graham

* Counsel of Record

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No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST CO. and CITICORP,
Petitioners,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
and
Respondents,

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT AND BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE U.S. CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

VICKI C. JACKSON
JAMES E. PFANDER
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464
Of Counsel

JOYCE HOLMES BENJAMIN
THE STATE AND LOCAL LEGAL CENTER
Suite 349
444 North Capitol St., N.W.
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

39 pp

QUESTIONS PRESENTED

1. Whether the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d)(1), which prohibits all interstate bank acquisitions unless "specifically authorized by the statute laws of the State in which such bank is located," and which was intended to permit each state's policy to determine the degree to which it would permit such acquisitions, authorizes states to permit interstate acquisitions of banks located within their borders only by bank holding companies located in a geographically limited number of other states.

2. Whether separately enacted Massachusetts and Connecticut statutes, each of which authorizes acquisitions of their within-state banks only by banks or bank holding companies located in other New England states that permit Massachusetts or Connecticut banks, respectively, to acquire banks within their borders, violate the Commerce Clause, art. I, § 8, cl. 3, or the Compact Clause, art. I, § 10, cl. 3, of the Constitution.

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INTERESTS OF AMICI

The amici organizations' members include state and local government officials throughout the United States. Amici and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

States play a unique and significant role in bank regulation. Concurrent with extensive federal regulation of national banks, Congress long ago recognized the desirability of permitting states to exercise powers of exclusion that would ordinarily be denied them under the Commerce Clause. Accordingly, the Douglas Amendment to the Bank Holding Company Act prohibits the Federal Reserve Board from approving interstate bank acquisitions, unless specifically authorized by the statutes of the state in which the bank to be acquired is located. Thus, Congress imposed an absolute restriction on interstate banking, leaving the states discretion to determine whether, and to what extent, to remove this federal barrier to interstate commerce.

The state statutes directly at issue here, those of Massachusetts and Connecticut, represent two of many choices that states have made in implementing the authority conferred upon them by the Douglas Amendment. Under the terms of these statutes, the federal bar on interstate acquisitions is lifted as to bank holding companies located in other New England States which themselves permit Massachusetts or Connecticut banks, respectively, to acquire banks within their states. While amici believe that resolution in favor of the states of both the Commerce Clause and Compact Clause issues is compelled by the Douglas Amendment, their interests in this matter are not confined to the somewhat unique area of interstate bank acquisitions.

Petitioners' arguments that these statutes are prohibited as an unapproved "Compact" would substantially restrict state power and authority in other areas as well.

Reciprocal state legislation on a multiplicity of issues exists. Moreover, states presently engage in a wide variety of mutually beneficial arrangements, agreements and understandings, with sister states to achieve a range of economic and cultural goals. Much of this interstate cooperative activity has been undertaken without explicit congressional consent, consistent with the decision in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978). Petitioners' effort here to undo *Multistate* and persuade this Court that the Massachusetts and Connecticut statutes are an unconstitutional "Compact" or "Agreement," could implicate a far broader range of cooperative state activity.

Thus, the legal issues presented by this case are of importance to all state governments. Amici accordingly submit this brief to assist the Court in its resolution of the Compact Clause issue.

STATEMENT OF THE CASE

The Bank Holding Company Act ("BHCA")[1] was enacted "to prevent the concentration of banking resources in the hands of a few financial giants [and] to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 46 (1980). The provision that lies at the heart of the instant case represents a compromise between two conflicting approaches to the control of interstate bank acquisitions, both designed to promote these fundamental goals.

The Douglas Amendment prohibits the Federal Reserve Board from approving a proposed out-of-state bank acquisition unless "specifically authorized by the statute laws of the State in which such bank is located."[2] The House Bill from which the Douglas Amendment emerged contained an absolute prohibition on interstate acquisi-

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[1] 12 U.S.C. §§ 1841 *et seq.*

[2] 12 U.S.C. § 1842(d)(1).

tions by bank holding companies.[3] As reported out of committee, the Senate version would have permitted interstate acquisitions subject only to the oversight of the Federal Reserve Board.[4] As Senator Douglas explained, the amendment that bears his name establishes a federal ban on interstate acquisitions but confers upon states regulatory power to permit such acquisitions "to the degree" the states see fit.[5] The only express constraint the amendment places on the free exercise of state power is its requirement that the state statute authorize the acquisition "by language to that effect and not merely by implication."[6]

Since 1956, states have exercised their authority over interstate bank acquisitions in a variety of ways that creatively respond to local policy concerns. In 1972, Iowa enacted legislation that permitted acquisition of Iowa banks by a single out-of-state holding company;[7] both the Federal Reserve Board and the D.C. Circuit approved this legislation as lying within the state's Douglas Amendment authority to promote "state policy" and "choose selectively" among potential out-of-state holding company entrants.[8] Maine—an erstwhile member of the so-called "New England Compact" Petitioners decry—adopted a statute that imposes very few restrictions on the acquisition of banks by out-of-state holding companies.[9] Other states lifted the federal bar to a degree but also retained

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[3] H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2, 5-7 (1955).

[4] S. Rep. No. 1095, Pt. 1, 84th Cong., 1st Sess. 10-11 (1955).

[5] 102 Cong. Rec. 6858 (1956).

[6] 12 U.S.C. § 1842(d)(1).

[7] *See* Iowa Code Ann. § 524.1805 (West Supp. 1984-85).

[8] *See Northwest Bancorporation*, 38 Fed. Reg. 21530, 21531-32 (1973), *aff'd, Iowa Independent Bankers v. Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

[9] Me. Rev. Stat. Ann. tit. 9-B, § 1013 (West Supp. 1984-85) (minimum capital requirements). Citicorp has established a full service bank in Maine pursuant to this provision.

certain limitations to advance local concerns.[10] New York, for example, permits only those holding companies from states with reciprocal laws to acquire local banks.[11] Alaska permits out-of-state acquisition of only those banks existing on a certain date.[12] Two states authorized interstate acquisitions only of failing banks.[13] Eight states, not including Connecticut and Massachusetts, enacted statutes authorizing bank holding companies from a multi-state region to acquire local banks.[14] And many states, by not enacting any legislation in this area, have chosen to retain the absolute federal bar on out-of-state bank acquisitions.[15]

The pattern of experimentation established throughout the country is reflected in New England, whose six states

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[10] *See* Fla. Stat. Ann. § 658.29(3)(d) (1984) (effective 1976) (authorizing entry of three out-of-state holding companies); Del. Code Ann. tit. 5, § 803 (Supp. 1984) (authorizing entry of out-of-state holding companies to establish financial center with stated assets and employees); Md. Fin. Inst. Code Ann. §§ 5-906-908 (Supp. 1984) (same).

[11] N.Y. Banking Law § 142-b (McKinney Supp. 1983).

[12] Alaska Stat. § 06.05.235 (1982).

[13] Or. Rev. Stat. § 716.920(8) (1983); Wash. Rev. Code Ann. § 30.04.230 (Supp. 1985).

[14] *See* Fla. Stat. Ann. §§ 658.295 *et seq.* (1984) (effective July 1, 1985); Ga. Code §§ 7-1-620 *et seq.* (Michie Supp. 1984); Ky. Rev. Stat. §§ 287.900 *et seq.* (Michie Supp. 1984); N.C. Gen. Stat. §§ 53-209 *et seq.* (Supp. 1984); R.I. Gen. Laws §§ 19-30-1, 19-30-2 (1984); S.C. Code Ann. tit. 34, ch. 24, 25 (Law Co-op. 1984); Utah Code Ann. §§ 7-1-102, 7-1-702 (Supp. 1984); 1985 Va. Acts (to be codified at Va. Code Ann. §§ 6.1-381 *et seq.*) (effective July 31, 1985). *See also* note 18 *infra*.

[15] Petitioner Citicorp has lobbied extensively in Florida, Maryland and elsewhere for so-called national reciprocal legislation that would authorize out-of-state banks from any jurisdiction with a similar statute to acquire the assets of local banks. Failing this, Citicorp has supported provisions that trigger the elimination of barriers at some future date, and those that authorize toe-holds in certain states that will ripen in time into full service banks. *See* R. Sczudlo, *Developments in the Area of State Regulation*, reprinted in, *Bank Acquisitions and Takeovers: 1984* 41, 67-76 (Practicing Law Institute 1984).

have adopted five responses to the problem of interstate banking. Vermont and New Hampshire have both rejected any interstate banking legislation, thus choosing to preserve the absolute bar on out-of-state bank acquisitions established in the Douglas Amendment. Maine, by contrast, has enacted provisions that liberally authorize out-of-state banks to acquire full service banks.

The three remaining states have enacted statutes between these two extremes. Massachusetts, Connecticut and Rhode Island each permit bank holding companies from New England states with reciprocal legislation to acquire banks within their borders.[16] None of these state statutes require any other state to adopt the geographic restriction that excludes petitioners from acquisitions in these states. Because these states chose to lift the bar of the Douglas Amendment only for bank holding companies located within New England, however, the federal prohibition on interstate expansion and concentration continues to apply outside that region.

SUMMARY OF ARGUMENT

I. An agreement among states requires Congress' consent under the Compact Clause only when it tends to increase the political power of those states in such a way as to encroach upon the just supremacy of the federal government. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978). Because this standard invalidates only those agreements that "impermissibly enhance state power at the expense of federal supremacy," *id.* at 472, the Douglas Amendment's "renunciation of federal interest" is dispositive. There, Congress expressly authorized states to determine whether to permit interstate bank acquisitions and, for purposes of this case,

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[16] *See* Mass. Gen. Laws Ann. ch. 167A § 2 (West Supp. 1984); Conn. Act No. 83-441 (1983) (to be codified at Conn. Gen. Stat. Ann. § 36 Pts. 552-57); R.I. Gen. Laws §§ 19-30-1, 19-30-2 (Supp. 1984). These state statutes are by no means identical; Rhode Island's statute, for example, includes a provision, effective July 1986, that will permit bank holding companies from any state with reciprocal laws to acquire in-state banks.

struck "the proper balance between federal and state power." *Id.* at 471. The Connecticut and Massachusetts reciprocal bank statutes neither increase the political power of the states nor otherwise encroach on the just supremacy of the federal government. Accordingly, they do not violate the Compact Clause.

A. Before applying the *Multistate* test, a reviewing court must determine whether the states have reached agreement on the challenged issue. In this case, neither the Connecticut nor the Massachusetts statute conditions reciprocity with other New England states on those states' adopting similar geographic limitations. Thus, the geographic exclusion of which Petitioners complain is not embodied in the reciprocity provisions that form the basis for their Compact Clause challenge, and further Compact Clause scrutiny is not appropriate.

B. Enactment of these statutes by the separate legislatures of Connecticut and Massachusetts in no way increases the political power of either state. While boundary agreements or agreements creating multistate agencies could threaten to enhance state political power at the expense of federal supremacy, these reciprocal statutes present no such threat. They do not affect either state's voting power in the Congress, nor create any multistate agency exercising sovereign powers. They do not confer otherwise lacking sovereign powers upon a state or states, nor do they compel other New England states to adopt similar geographic restrictions. Given the conclusion that the Multistate Tax Commission did not impermissibly alter the political balance, these statutes *a fortiori* pose no such risk.

Petitioners' argument that the Compact Clause is offended by agreements that may economically disadvantage other states is neither factually apposite nor consistent with the reasoning of *Multistate*. As *Multistate* makes clear, states may freely confer mutual economic benefits on one another under the Compact Clause so long as they do not offend the Commerce Clause or an-

other constitutional area of federal supremacy. Indeed, many agreements and other forms of state cooperation promote regional economic development and interests, and have been neither approved by Congress, nor questioned by the courts. Such arrangements pose no threat to any sister state's sovereignty and thus cannot violate the Compact Clause.

C. Nor do these statutes encroach on the "just supremacy" of the United States, in view of the Douglas Amendment's renunciation of a federal interest in regulating interstate bank acquisitions. Plainly the Commerce Clause is not offended by the two state statutes. Congress has unquestioned power to restrict the flow of interstate commerce. In adopting the Douglas Amendment, Congress interposed just such a federal restriction on out-of-state bank acquisitions and, at the same time, authorized the states to determine the degree to which such acquisitions of local banks would be permitted. This renunciation of a federal interest removes any objection founded on the Commerce Clause or Congress' regulation of banking, and, with it, any asserted encroachment on the "just supremacy" of the United States.

II. Petitioners err in contending that the Compact Clause requires Congress to consent "explicitly and with full knowledge" of the compact being approved. Although this case presents no occasion for addressing this question, this Court has consistently held that Congress may "consent . . . in advance . . . or by giving express or implied approval to an agreement the states have already joined." *Cuyler v. Adams*, 449 U.S. 433, 441 (1981). Sister states claiming prejudice from an exercise of state authority may seek redress from Congress at the time of injury, and are thus not prejudiced by advance or implicit congressional authorizations.

ARGUMENT

I. THE CONNECTICUT AND MASSACHUSETTS STATUTES DO NOT IMPINGE ON THE JUST SUPREMACY OF THE NATIONAL GOVERNMENT AND DO NOT REQUIRE CONGRESSIONAL CONSENT UNDER THE COMPACT CLAUSE

The Compact Clause of the Constitution, art. I, § 10, cl. 3, provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power." Literally construed, the Compact Clause would invalidate a great variety of beneficial forms of state cooperation unless the states convinced a busy Congress to place its imprimatur on each arrangement. As a practical matter, the expense and inconvenience of obtaining such consent would preclude many beneficial cooperative state agreements.

At least since its decision in *Virginia v. Tennessee*, 148 U.S. 503 (1893),[17] this Court has recognized that the framers did not intend so unworkable a scheme. There, the Court limited the sweep of the requirement of Congressional consent

> to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.

Id. at 519. *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976), and *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978), confirmed that *Virginia v. Tennessee* states the proper test for determining whether the absence of Congressional consent precludes state cooperation. The fundamental question is whether the challenged agreements "enhance state power at the expense of federal supremacy." 434 U.S. at 472.

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[17] Early suggestions to the same effect appear in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) and *Union B. R. Co. v. East Tennessee & G.R. Co.*, 14 Ga. 327, 339 (1853).

Petitioners' Compact Clause challenge to the Connecticut and Massachusetts statutes confuses the reciprocity provisions with the geographic limitations to conjure an agreement that does not, in fact, exist. Petitioners ignore the decisive effect of the Douglas Amendment in assessing the nature of the federal interest in interstate banking acquisitions, and can show no political encroachments on federal interests or state sovereignty that the "just supremacy" of the United States protects. Accordingly, their constitutional challenge must fail.

A. There Is No Agreement Between Massachusetts And Connecticut To Exclude States Outside New England

Petitioners disparagingly refer to the Connecticut and Massachusetts statutes as a "New England Compact," and then purport to apply this Court's Compact Clause analysis to determine whether Congressional approval should have been obtained. Although this Court's decision in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978), certainly sanctions Compact Clause scrutiny of informal, as well as formal, interstate agreements, it does not require such scrutiny in the absence of at least some agreement between compacting states.[18]

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[18] While the *Multistate* Court stated that "agreements effected through reciprocal legislation may present opportunities for enhancement of state power," 434 U.S. at 470, it did not state that reciprocal legislation of itself necessarily imports an agreement. Indeed, in *Bode v. Barrett*, 344 U.S. 583, 586 (1953), the Court stated that "reciprocal arrangement[s] between states [have] never been thought to violate the Compact Clause;" Justice Frankfurter, who dissented on the grounds that the legislation in question burdened interstate commerce, did not question or take issue at all with the majority's brief disposition of the Compact Clause challenge, notwithstanding his interest and familiarity with such issues. 344 U.S. at 586 (Frankfurter, J., dissenting). *See also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951) (Frankfurter, J.) (recognizing that "growing interdependence of regional interests, calling for regional adjustments," has brought extensive use of compacts).

The reciprocal character of the Massachusetts and Connecticut legislation provides the centerpiece of Petitioners' claim that such an agreement was effected. A careful examination of the statutes, however, reveals that their reciprocity provisions in no way condition entry of out-of-state bank holding companies on the adoption by such other states of similar geographical limitations. Neither Massachusetts nor Connecticut requires the other, or any New England state, to exclude non-New England states in order to benefit from the reciprocity provisions. All that the reciprocity conditions require is that states whose banks want to acquire a Connecticut bank, for example, permit Connecticut banks to make acquisitions within their territory.[19] Thus, nothing in the challenged statutes prevents holding companies located in Maine from acquiring banks in both Connecticut or Massachusetts, despite Maine's failure to adopt a geographic restriction. *Cf. Multistate*, 434 U.S. at 492 (White, J., dissenting) (compact there required member states to provide certain tax options).

In sum, each of the New England states remains free to assess the competitive character of its own local banking industry and to permit or deny out-of-state entry under the Douglas Amendment to the degree it sees fit. Maine and Rhode Island have adopted statutes strikingly different from those under review; New Hampshire and Vermont have chosen to leave intact the federal bar on out-of-state entry. Massachusetts and Connecticut, moreover, each retains authority to reconsider its interstate banking statute and amend or repeal it if local conditions change.[20]

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[19] *See* Mass. Gen. Laws Ann. ch. 167 § 2 (West Supp. 1984); Conn. Act. No. 83-441 (1983) (to be codified at Conn. Gen. Stat. Ann. § 36 Pts. 552-57).

[20] Reciprocal legislation in general poses less potential for intrusion on federal interests than a formal compact or agreement subscribed to as such by the states, since it may be modified by participants at any time. *Cf. Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823) ("compact or agreement" under art. I, sec. 10, cl. 3 is

In such a dynamic legislative environment, Petitioners cannot well argue that the reciprocal character of the challenged statutes causes them any injury. The New England states have not monolithically enacted statutes with a purely regional focus nor do the challenged statutes require such a focus in other states. Rather, it was the independent decisions of Connecticut and Massachusetts legislators that their own banking industry would be well served by some, but not unlimited, interstate competition that Petitioners challenge in this Court.[21] Petitioners' legal injury, if any, does not arise from the reciprocity provisions. While it is thus doubtful that any further analysis of the statutes under the Compact Clause is necessary, application of the *Multistate Tax Commission* standard confirms that congressional consent to these state laws is not required.

B. The State Laws At Issue Here Do Not Increase The Political Power Of Massachusetts And Connecticut Or Impair Sovereignty Of Other States

Enactment of legislation regulating interstate bank acquisitions by the separate legislatures of Connecticut and Massachusetts will in no way "increase and build up the political influence of the contracting states," *Virginia v. Tennessee*, 148 U.S. at 517-18, in derogation of the concept of Union embodied in the Compact Clause. As originally understood, the Compact Clause was aimed principally at requiring congressional consent to border compacts,[22] perhaps because they may affect the voting

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enforceable contract which the states are forbidden to impair); *Texas v. New Mexico*, 462 U.S. 554, 569 n.16 (1983) (states may only withdraw from compact in accordance with its terms).

[21] Indeed, any suggestion that there was an actual "agreement" to "boycott" New York is refuted by the legislative process itself, in which individual legislators of each state participated. *See also United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 478 (1978) (individual state's decision, though based on commission recommendation, no threat to other states' sovereignty).

[22] *See* F. Zimmerman & M. Wendell, *The Law and Use of Interstate Compacts* 22 (1976) [hereinafter cited as "Zimmerman &

power of the states in Congress and thus pose a threat of increased or altered political influence.[23] In modern times, the most dramatic new use of congressionally-approved compacts has been to establish multistate government agencies, exercising sovereign powers over, *e.g.*, the Port of New York,[24] or the Delaware River Basin.[25]

The economic regulation of interstate banking by Connecticut and Massachusetts will clearly not alter their voting power in Congress, nor otherwise affect the po-

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Wendell, *Law and Use*"]; Council of State Governments, *Interstate Compacts & Agencies* vi (1983) [hereinafter cited as "Council, *Interstate Compacts*"] (from 1783 to 1920, states entered into 36 compacts dealing predominantly with "common boundary line[s]"). *See also* F. Zimmerman & M. Wendell, *The Interstate Compact Since 1925* 3 (1951) [hereinafter cited as "Zimmerman & Wendell, *Compacts Since 1925*"]. One modern scholar suggests that the framers understood the terms "compact" and "agreement" to refer to dispositive transactions, such as border compacts, that resolve issues for all time and do not contemplate continuing performance. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 Mich. L. Rev. 63, 77 (1965) [hereinafter cited as "Engdahl"]. In *Multistate*, 434 U.S. 452, 459-64 & nn.10-14, the Court surveyed various interpretations of the original meaning, concluded that the passage of time had eroded any distinct meaning and proceeded to apply the test articulated in *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

[23] *See* Zimmerman & Wendell, *Law and Use*, *supra* note 22, at 23; *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

[24] The New York-New Jersey Port Authority Compact, 65 Stat. 650 (1921), a landmark in the history of compact evolution, established a commission to develop and construct comprehensive transportation and terminal facilities and to promote commerce and trade. The Port Authority today employs 8000 workers. *See* Council, *Interstate Compacts*, *supra* note 22, at 2. Its success has spawned similar efforts in such interstate Metropolitan areas as St. Louis and Philadelphia. *Id.* at 17.

[25] The Delaware River Basin Compact, 75 Stat. 688 (1961), established a commission that serves as a regional multipurpose water resources agency. Notably, the United States joined as a party to the compact. *See* Grad, *Federal-State Compact: A New Experiment In Co-operative Federalism*, 63 Colum. L. Rev. 825 (1963).

litical power of those two states.[26] Neither state has relinquished or delegated its police or other sovereign powers; no interstate agency or commission has been created. Neither state conditions reciprocity on other states' having geographic limitations, and each state retains power to supervise its regulatory initiative and define the scope of permissible bank acquisitions within its own borders.

On such a record, there is no basis for finding a prohibited enhancement of state political power that " ' project[s] a new presence onto the federal system [or] alter[s] any state's basic sphere of authority.' " [27] Unable to make such a showing, Petitioners claim that the statutes offend the sovereignty of non-New England states and thus violate the Compact Clause. The difficulties with this formulation are legion.

To begin with, the exclusion of sister states of which Petitioners complain was established by the Douglas Amendment, which erected a federal barrier preventing bank holding companies from acquiring banks in other states. Against the background of this *federal* prohibition on interstate acquisitions, the challenged legislation operates to enhance competition within New England.[28]

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[26] *Cf. Multistate*, 434 U.S. at 479 n.33 (enhanced capacity to lobby Congress does not encroach on or interfere with just supremacy of the United States).

[27] *Multistate*, 434 U.S. at 470 n.21 (quoting Prof. Tribe). *Cf. Salorio v. Glaser*, 414 A.2d 943, 957 (N.J.), *cert. denied*, 449 U.S. 804 (1980). As in *Multistate*, the statutes as issue do "not purport to authorize the member States to exercise any powers they could not exercise in its absence." *Id.* at 473. The case for finding a prohibited compact is, in fact, far less compelling than in *Multistate*, where an interstate commission sought to apply uniform tax standards to all businesses operating in interstate commerce. Indeed, apart from boundary resolutions and actions which, through the creation of new government entities or otherwise, reallocate or delegate powers of governance, state agreements are unlikely to "build up" or enhance state political power *"quoad* the National Government." 434 U.S. at 473.

[28] Indeed, the Federal Reserve Board found evidence that the proposed merger between BNE of Massachusetts and CBT of Con-

Petitioners' fundamental complaint, it must be seen, is with the policy of the Douglas Amendment, and not with the regional lifting of its bar adopted by Massachusetts and Connecticut.[29]

Apart from its mistaken premise that it is the challenged state laws that "derange" state relations, Petitioners' claim of "affront" to sister states is inconsistent with the reasoning in *Multistate*.[30] The appellants in

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necticut would potentially enhance consumer welfare in New England by creating a financial institution with the resources to compete with large interstate financial conglomerates in offering "nonbanking" financial services. Pet. App. A44. The argument that the regional restriction burdens commerce by limiting the capital market for bank shares similarly ignores the even greater restriction imposed by federal law. *Cf.* Bolger Trust Am. Br. at 3-4.

[29] Under the Douglas Amendment, every state is free to permit entry by out-of-state banks, subject to limitations in keeping with the interests of its citizenry and health of its banking industry. New York has itself done so, enacting a reciprocity provision that does not remove the federal bar for New Hampshire or Vermont bank holding companies that might seek to acquire New York banks, small or large. *Cf.* N.Y. Am. Br. at 3.

[30] Petitioners err in relying on dicta from *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1855) to support their theory that the Compact Clause requires an inquiry—separate from the Commerce Clause—into possible disadvantaging of economic rights and interests of other states. First, *Florida v. Georgia* concerned the right of the United States to intervene in a boundary dispute litigation. In this context, the Court's reference to the United States as the representative of the interests of the other states simply restates the modern formulation of the function of the Compact Clause; it has been consistently recognized that boundary adjustments, since they change the character of the sovereign participants in the Republic, affect the sovereign political interests of all. Second, as the other case cited by Petitioners suggests, any "state interests" viewed as protected under the Compact Clause must be viewed as the states' interests *in the federal union. See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (Compact Clause guards against "the derangement of [the states'] *federal* relations with the other states of the Union.") (emphasis added). *Cf. People ex rel. Barlow v. Curtis*, 50 N.Y. 321, 324 (1872) ("The highest interests of the States are promoted by yielding to the general government and protecting it in the enjoyment of unquestioned control over the subjects confided to it by the Con-

Multistate claimed that the Tax Compact exerted "undue pressure" on nonmember States "in violation of their 'sovereign right[s] . . . .'" 434 U.S. at 477. Finding any such pressure to arise "independent of the Compact," the Court went on to hold that, even if economic pressure arose from the Compact, it would *not* be "an affront to the sovereignty of the nonmember States," or implicate "our federal structure," "[*u*]*nless* that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause. . . ." 434 U.S. at 477-78 (emphasis added). As discussed below, the statutes here do not violate the Commerce Clause, and no claim has been made under the Privileges and Immunities Clause.[31]

Petitioners' argument that economically beneficial but geographically limited reciprocal statutes "affront" other states' sovereignty so as to require Congress' consent would, by focussing analysis on alleged injury to other states rather than encroachment on federal interests, threaten many established forms of state cooperation. Such an approach to the Compact Clause, unless bounded by the principles of Commerce Clause analysis, would disrupt many accepted and beneficial forms of state cooperation.

Compacts, like reciprocity statutes, are generally entered into for the mutual improvement and benefit of the contracting states.[32] Without reference to the interests

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stitution."). *See also Multistate*, 434 U.S. at 467 (interpretations of the Compact Clause preceding *Virginia v. Tennessee* are such a "puzzlement" that they provided little guidance). Petitioners offer no persuasive basis to abandon the *Multistate* analysis.

[31] The Compact Clause, independent of other constitutional constraints, protects only against aggrandizement of state political power at the expense of the federal government, which has not occurred here. *Compare* 434 U.S. at 479 n.33 *with id.* at 494 (White, J., dissenting).

[32] The statutes at issue here, though not an agreement at all, were plainly enacted by Massachusetts and Connecticut for the benefit of their respective citizens. And the reasonableness of the geographic restriction for each State's first experiment in 30 years in permitting interstate acquisitions is suggested by Congress' own

of non-compacting states, this Court has approved explicit agreements designed "to promote the peace, good neighborhood, and welfare of both [compacting] states, and facilitate intercourse between their citizens." *Wharton v. Wise*, 153 U.S. 155, 167 (1894). Such arrangements, by their very nature, tend to establish special relationships between the party states, but do not run afoul of the Compact Clause on that basis.[33]

A wide variety of uniform laws, reciprocal agreements, and regional promotional arrangements might be subject to attack under Petitioners' view that the Compact Clause will prohibit, absent congressional consent, what mutual economic advantages to the compacting parties the Commerce Clause permits. Uniform state laws on a variety of subjects exist, and often confer reciprocal rights on the enacting parties.[34] These statutes have

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use of the New England states as a laboratory for its experiment with NOW accounts. *See Otero Sav. & Loan Ass'n v. Federal Reserve Bd.*, 665 F.2d 279, 283 (10th Cir. 1981).

[33] Justice Frankfurter articulated a classic rejoinder to the claim that conferring such a joint benefit violates the Compact Clause:

> an argument that benefiting other States is beyond the power of a State would completely disregard the inherent implications of our federalism within whose framework our organic society lives and moves and has its being—the abundant and complicated interrelationship between national authority and the States, and between the States *inter sese*. To yield to this argument would foreclose to the States virtually all arrangements which increase comity among the States.

New York v. O'Neill, 359 U.S. 1, 9, (1959) (citation omitted). *See also Bode v. Barrett*, 344 U.S. 583, 586 (1953); *St. Louis & S.F.R. Co. v. James*, 161 U.S. 545, 562 (1836).

[34] The National Conference of Commissioners on Uniform State Laws, founded in 1896, produces up to ten new proposed uniform laws every two years. *See generally* Council of State Governments, *The Book of The States: 1982-83*, 84-85. Among the most popular as of September 1, 1981 were the Uniform Anatomical Gift Act (50 jurisdictions), the Uniform Commercial Code (50 jurisdictions), the Uniform Declaratory Judgment Act (43 jurisdictions), the Uniform Limited Partnership Act (50 jurisdictions), and the Uniform Criminal Extradition Act (49 jurisdictions). *Id.* at 86-88.

always been upheld when challenged under the Compact Clause,[35] yet Petitioners' approach would permit attack if non-participating states claim any disadvantage from their enactment by others. States have adopted a variety of other multistate and bi-lateral arrangements, designed to make the most efficient use of existing institutions.[36] Such arrangements necessarily exclude other states but have never been understood as subject to Compact Clause challenge on that basis.[37]

Moreover, states across the country have in recent years recognized that there are "regional interests, regional cultures and regional interdependencies" that, without threat to the interests of other states or the

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[35] *See Ivey v. Ayers*, 301 S.W. 2d 790 (Mo. 1957) (Uniform Support of Dependents Law); *Landes v. Landes*, 1 N.Y. 2d 358, 135 N.E. 2d 562 (1956) (same). *Gulley v. Apple*, 210 S.W. 2d 514 (Ark. 1948) (Uniform Act for Out-of-State Parole Supervision); *Ex Parte Tenner*, 20 Cal. 2d 670, 128 P.2d 338 (1942) (same). *See also General Expressways, Inc. v. Iowa Reciprocity Board*, 163 N.W.2d 413 (Iowa 1968) (Uniform Vehicle Registration Proration and Reciprocity Compact).

[36] *See, e.g.*, Minnesota-Wisconsin Student Reciprocity Agreement, Wis. Stat. Ann. § 39.47 (West Supp. 1984-85) (reciprocal waiver of nonresident tuition). *See also* Zimmerman & Wendell, *Interstate Compacts, reprinted in* Council of State Governments, *The Books of the States: 1976-1977* 573 (describing efforts of New England Board of Higher Education to coordinate joint legislative approval of regional college of veterinary medicine, open to all students from region with advantageous tuition arrangement). Other regional agreements provide for the mutual availability of health services and facilities, radiological treatment facilities and welfare services and benefits, all without congressional consent. *See* notes 38, 39 *infra*.

[37] *See, e.g., Opinion of the Justices*, 344 Mass. 770, 184 N.E. 2d 353 (1962) (proposed compact among New England states providing for the cooperative use of the region's correctional institutions would not require congressional approval under *Virginia v. Tennessee*). *See also Breest v. Moran*, 571 F. Supp. 343, 345 (D.R.I. 1983). *Cf. St. Louis & S.F.R. Co. v. James*, 161 U.S. 545, 562 (1836) (reciprocal bi-state regulation of railway, without congressional consent, does not violate Compact Clause "in absence of inhibitory legislation by Congress").

supremacy of the nation, justify "regional solutions." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 708 (1925). Many have accordingly entered into regional development agreements, whose express purpose is to enhance the economic and resource development of member states.[38] Many of these have not received congressional consent.[39]

Under Petitioners' proposed focus on the economic interests of nonparticipating states, such agreements as the Southern Growth Policies Agreement, the Southern Regional Education Compact, and the New England Radiological Health Protection Compact, none of which has received congressional consent, and a wide variety of less formal, mutually beneficial arrangements between states in different regions would fall under a cloud of constitutional suspicion. But under *Multistate*, alleged affronts to state economic interests are measured against the Commerce Clause, and are not viewed as impairments of state sovereignty implicating the fundamental

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[38] In adopting the Southern Growth Policies Agreement to foster economic growth through cooperative planning and development, for example, the 12 Southern member states found that they shared "a sense of community based on common social, cultural and economic needs and fostered by a regional tradition." Va. Code Ann. §§ 2.1-339.1 (1979 Repl.) (effective 1971). Other regions of the country, including the West and New England, have entered into compacts that pledge cooperation on subjects as diverse as nuclear energy, health, and education. *See* Council, *Interstate Compacts*, *supra* note 22, at 11, 13 & 15 (describing, *inter alia*, Southern Regional Education Compact, New England Radiological Health Protection Compact, Western Interstate Energy Compact). *See also* note 39 *infra*.

[39] A partial list of regionally exclusive compacts that have not received congressional consent includes the following: Southern Regional Education Compact, Md. Educ. Code Ann. §§ 25-201-25-205 (1978); New England Health Services and Facilities Compact, Me. Rev. Stat. Ann. tit. 22 §§ 691-99 (1980); New England Radiological Health Protection Compact, Me. Rev. Stat. Ann. tit. 22, §§ 751-59 (1980); Southern Growth Policies Agreement, Va. Code Ann. §§ 2.1-339.1 *et seq.* (1979 Repl.).

concern of the Compact Clause: to protect against a build-up of state political power "that threatens the Supremacy of the Federal Government." *New Hampshire v. Maine*, 426 U.S. at 370.

C. These State Laws Do Not Encroach Upon The Just Supremacy Of The United States

As presently understood, the Compact Clause and its requirement of congressional consent apply only to " 'the formation of any combination tending to the increase of political power in the states, *which may encroach upon or interfere with the just supremacy of the United States.*' " *Multistate*, 434 U.S. at 468, (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). This test validates compacts and other forms of state cooperation that "promote the . . . welfare of both States," *Wharton v. Wise*, 153 U.S. at 166, and do not " 'infringe[] the rights of the national government.' " *Virginia v. Tennessee*, 148 U.S. at 519 (quoting II J. Story, *Commentaries on the Constitution of the United States* § 1403 (Cooley ed. 1873)).

The Douglas Amendment decisively defines the scope of the "rights of the national government" in a way that defeats Petitioners' Compact Clause challenge to the Connecticut and Massachusetts statutes. The Amendment erects a federal barrier to interstate bank acquisitions, and gives states authority to permit such acquisitions to the degree they see fit. As the Court below concluded, such a grant of authority renders the Connecticut and Massachusetts statutes "invulnerable" to Commerce Clause challenge. The Douglas Amendment, moreover, effects a renunciation of federal interest in regulating this aspect of interstate bank acquisitions and thus precludes any possible encroachment on the "just supremacy" of other federal regulatory interests.

1. *The Massachusetts and Connecticut Statutes Do Not Violate the Commerce Clause*

This Court has long recognized, and Petitioners do not deny, that Congress may, in the exercise of its authority

over interstate commerce, confer upon states power they would otherwise lack to regulate an area of interstate commerce. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423-24 (1946). When Congress authorizes such state regulation with the requisite degree of clarity, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 653 (1981). *See Prudential Insurance Co. v. Benjamin, supra*, 328 U.S. at 429, 431.

As both the reviewing Court below and the federal agency charged with applying its provisions have held, the Douglas Amendment grants states control over the degree to which out-of-state bank holding companies may acquire local banks. In order "to prevent the concentration of banking resources in the hands of a few financial giants," *Lewis v. BT Investment Managers*, 447 U.S. at 46, the Douglas Amendment divides the country into fifty banking regions, defined by the boundaries of the states, and prohibits acquisitions across state lines

> unless [such acquisition] is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. § 1842(d)(1). Congress has thus empowered each state to control the extent to which out-of-state bank holding companies may acquire banks within the state.

It has been argued, however, that despite this unrestricted authorization the states are disabled from adopting innovative approaches and must choose between retaining the blanket federal prohibition on interstate banking or permitting interstate banking on the broadest national scale. The plain language of the statute, however, supports the view that the congressional grant of authority vested the states with power to deal creatively, and on a geographically limited basis, with interstate

banking acquisitions.[40] Review of the legislative history of the Douglas Amendment rebuts any all-or-nothing interpretation.

In support of his amendment, Senator Douglas traced the history of increasing financial concentration in this country and highlighted the central role that bank holding companies played in such concentration. *See* 102 Cong. Rec. 6850, 6857-60 (1956). In particular, Douglas called attention to the use of bank holding companies as a device to skirt limitations states had imposed on branch banking. In explaining the limitations he proposed on the powers of bank holding companies to make interstate acquisitions, Senator Douglas relied on the McFadden Act, 12 U.S.C. § 36(c),[41] which had made national banks chartered by the Comptroller of the Currency subject to the same restrictions on branching that each individual state applied to state-chartered banks within its borders.

At the time of the Douglas amendment, the states had developed a variety of innovative branch banking laws responsive to the policy imperatives of their particular regions.[42] Senator Douglas was aware of this variation among state laws and called it to the attention of his

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[40] Indeed, by requiring states to act by "statute," Congress placed control over the decision to permit interstate mergers, not in the offices of state banking commissioners, but in the houses of the state legislatures. This grant of authority directly to state legislatures suggests that Congress anticipated that these laboratories of inventiveness would bring their creative powers to bear on the problem of interstate banking. *Cf. New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1933) (Brandeis, J., dissenting).

[41] 102 Cong. Rec. 6858 (1956).

[42] As of the approximate date of the Douglas Amendment, some seventeen states permitted statewide branch banking; thirteen flatly prohibited it; and sixteen authorized branching within limited areas. *See* Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 Banking L. J. 921, 942 (1957) (compiling analysis of state laws).

colleagues.[43] Douglas pointed out that branch banks had grown rapidly in the years prior to the McFadden Act "and to check their growth various states passed laws limiting, and in some cases preventing it, as in the case of Illinois." 102 Cong. Rec. 6858 (1956). National banks sought power to establish branches freely but, as Douglas emphasized, the McFadden Act authorized such banks to open branches "only *to the degree* permitted by State law and State authorities." *Id.* (emphasis added) (referring to McFadden Act).

In describing the scope of state authority to permit interstate acquisitions by bank holding companies under his amendment, Senator Douglas chose the same all-encompassing phrase: the amendment "will permit out-of-State holding companies to acquire banks in other States only *to the degree* that State laws expressly permit them." *Id.* (emphasis added). Senator Douglas thus explicitly contemplated that state regulation of interstate acquisitions would range from statutes banning interstate acquisitions to those freely permitting such acquisitions and would include intermediate provisions permitting interstate acquisitions "to the degree" consistent with local policy concerns.[44] Over objections by Senators concerned with "discrimination by one State against

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[43] *See, e.g.*, 102 Cong. Rec. 6858 (1956) (Sen. Douglas) (describing New York's plan; State divided into 10 zones, with branch banking permitted within each region; bank-holding companies evaded competitive purpose of zones by acquiring banks in all zones).

[44] *See also id.* at 6860 ("the amendment would leave the way open for States to make explicit provisions for such purchases and acquisition if they so decided."); *id.* at 6859 ("explicit permission" requirement) (Douglas). Other sponsors plainly shared Senator Douglas's understanding that the proposed amendment would authorize varying state legislative responses. Senator Payne argued that

> the control of expansion of bank holding companies across state lines into state banks *is a matter of primary concern to the State governments* and is an area *best left to their discretion.*

Id. at 6862 (emphasis added).

another" [45] and with Congress' "requir[ing] discrimination in interstate commerce," [46] his amendment was adopted. In the face of this record, there can be little doubt that the Massachusetts and Connecticut statutes are within the authority granted by Congress and thus "invulnerable to Commerce Clause challenge." [47]

2. *The Douglas Amendment's Renunciation of a Federal Interest Alters the Balance of State and Federal Power Over Interstate Bank Acquisitions and Precludes Finding An Encroachment on Federal Supremacy*

As shown above, each of these statutes is authorized by the Douglas Amendment. The fact that two states enacted the same regional restriction in no way constitutes an encroachment on federal supremacy.

This Court has been understandably "reluctant to strike down newly emerging forms of interstate cooperation." *Multistate*, 434 U.S. at 465. Indeed, only where a state agreed with a foreign power to an extradition in derogation of exclusive federal authority has this Court found

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[45] *Id.* at 6861 (Remarks of Sen. Bricker).

[46] *Id.* at 6860 (Remarks of Sen. Bennett).

[47] Given the choice between the national reciprocal state legislation that petitioner Citicorp has lobbied for, *see* note 15, *supra*, or the geographically limited lifting of the ban on interstate acquisitions that Connecticut and Massachusetts have chosen, there can be little doubt that Senator Douglas would favor the latter approach. In support of his amendment, he filled many columns of the Congressional Record with a well-documented concern to prevent both any "tendency toward monopolizing credit by driving out the small banks," and any "concentration [in] banking . . . power," 102 Cong. Rec. 6857, which, based on experience here and abroad, he thought would result if bank acquisitions and mergers were not halted. *Id.* at 6858-59. He made clear his goal of "a bank situation in which there are a large number of banks with no monopoly and with a dispersion of power," and rejected arguments by opponents that it would be unfair to competitors of existing large banks to preclude their expansion: "The present degree of concentration of control does not give everyone else a vested right to equivalent expansion." *Id.* at 6860.

a violation of the Compact Clause.[48] State cooperation on such matters of concurrent state and federal interest as the building of railroads or bridges, the improvement of levees and drainage of lands, has been sustained without Congress' consent.[49] Understood as stating the "proper balance between federal and state power," *id.* at 471, and informed by the distinction between areas in which federal control must be exclusive and those in which states remain competent to act, *Multistate's* analysis requires consent only to those forms of state cooperation that would encroach upon the exercise of federal powers.[50]

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[48] *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840). *Holmes* is the only federal case of which amici are aware in which state action was arguably found to violate the Compact Clause. It is currently understood as recognizing that the preeminent federal power displaces state extradition agreements with foreign countries. *See Multistate*, 434 U.S. at 465 n.15; *see also United States v. Rauscher*, 119 U.S. 407, 414 (1886); *People ex rel. Barlow v. Curtis*, 50 N.Y. 321, 331 (1872).

[49] *See St. Louis & S.F. R. Co. v. James*, 161 U.S. 545, 562 (1896). (railroad); *Union Branch R. Co. v. East Tennessee & G. R. Co.*, 14 Ga. 327, 339 (1853) (railroad); *Dover v. Portsmouth Bridge*, 17 N.H. 200, 223 (1845) (bridges); *Fisher v. Steele*, 39 La. App. 447, 1 So. 882 (1887) (levees); *McHenry County v. Brady*, 37 N.D. 59, 70, 163 N.W. 540, 544 (1917) (upholding informal drainage agreement between North Dakota county and Canadian province).

[50] In analyzing reciprocal state regulation of a railroad that extended across state boundaries, this Court has noted:

> Such legislation on the part of two or more states is not, *in the absence of inhibitory legislation by Congress*, regarded as within the constitutional prohibition of agreements or compacts between states.

St. Louis & S.F.R. Co. v. James, 161 U.S. 545, 562 (1836) (emphasis added). The decision thus recognizes that the failure of Congress to exercise certain powers may leave states an arena of regulatory competence over matters that touch upon interstate commerce. Petitioners thus err in claiming that the court below improperly dismissed their Compact Clause challenge in reliance on congressional power "to remove the encroachment by appropriate legislation." *Northeast Bancorp., Inc. v. Board of Governors*, 740 F.2d 203, 209 (2d Cir. 1984). The court's analysis correctly

Petitioners' Compact Clause attack ignores the decisive effect of the Douglas Amendment in defining the strength and nature of the federal, as opposed to state, interests involved.[51] Congress has granted control over interstate bank acquisitions to the states through the Douglas Amendment, clearly expressing its intention to withdraw from the field and leave to each state's competence the task of defining the extent to which such acquisitions will be permitted within its borders.[52] Although, federal presence obviously remains in other aspects of interstate bank regulation, the agency charged with implementing national banking policy has construed the Douglas Amendment as a grant to the states of "plenary power to regulate entry of out-of-state bank holding companies" and "a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." Pet. App. A52. Such a renunciation of interest precludes a finding that a state statute within the literal terms of the Douglas Amendment poses any threat to the supremacy of Federal power that the Compact Clause seeks to safeguard.

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recognizes that congressional withdrawal from the field of interstate bank acquisitions eliminates, for now, any "just supremacy" concern.

[51] The application of these principles to the compact at issue in *Multistate*, 434 U.S. at 472-78, illustrates the manner in which this Court has tested state cooperation for evidence of interference with Congressional power. The Court proceeded from the assumption that under the Commerce Clause the states, individually, could properly tax multistate business operations and searched the compact for evidence that the states, jointly, were overstepping these established bounds. Finding no evidence of such enhanced "state power *quoad* the National Government," *id.* at 473, the Court upheld the compact. *Id.* at 479. The *Multistate* decision thus adopts a Compact Clause analysis that tests joint state regulatory initiatives for evidence of conflict with the federal commerce and other powers.

[52] Congress undoubtedly has authority to reverse its decision and to regulate all aspects of interstate banking acquisitions, displacing state authority. *Cf. Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856).

Petitioners recognize the significance of this renunciation of federal interest in interstate bank acquisitions but claim that the Douglas Amendment does not save the challenged statutes because it does not explicitly contemplate, and thus consent to, regional banking districts.[53] Such a claim misconceives the nature of the *Virginia v. Tennessee* test, which authorizes state cooperation in the absence of any congressional consent so long as the resulting combination does not encroach upon just supremacy. Under a proper analysis, the Douglas Amendment need not operate as explicit consent to any interstate compact.[54] Rather, its renunciation of federal interest

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[53] Petitioners mistakenly cite this Court's decision in *United States v. Public Utils. Comm'n*, 345 U.S. 295, 309 n.16 (1953), for the proposition that where a Congressional statute delegates power to a single host "State," this Court has followed a rule of construction that forbids cooperative state action. The footnote Petitioners cite refers to a lower court decision rejecting the claim that Congress had intended to permit states jointly to regulate interstate electricity sales. Unlike the instant case, however, the history and structure of the statute at issue there revealed congressional intent for the FPC to regulate all interstate sales, thereby foreclosing any state regulation.

[54] Congress' failure to act on requests to approve the Massachusetts and Connecticut statutes in no way suggests that, absent consent, the acts are unconstitutional. This Court has quite properly recognized that efforts may be made to obtain congressional approval, not because such approval is required but from "considerations of caution and convenience," *Multistate*, 434 U.S. at 471; and likewise, that Congress' failure to approve such attempts does not imply any disapproval of the matter under consideration. *Id.* at 458 n.8 (congressional approval sought, unsuccessfully, on 12 occasions).

Many other compacts have gone into operation after congressional approval was sought but not given. Celler, *Congress, Compacts & Interstate Authorities*, 26 Law & Cont. Prob. 682, 686 (1961) (Southern Regional Education Compact; Interstate Compact on Juveniles). Such an approach does not deprive Congress of its central role in assessing compacts for potential conflicts with its regulatory initiatives; indeed, Congress has enacted legislation specifically requiring consent to any compacts in regulatory areas where it perceives state cooperation as presenting a potential of conflict. *See* 42 U.S.C. § 2021d(a)(2)(B) (1980) (requiring explicit consent to compacts affecting low-level radioactive wacte

sharply restricts the area of undoubted federal supremacy and thus frees the states to cooperate more closely without threatening the proper balance of federal and state power.[55]

In view of Petitioners' failure to show any encroachment by the Massachusetts and Connecticut statutes on the "just supremacy" of the United States, the two state laws at issue here should be upheld.

II. CONGRESS MAY GIVE ITS CONSENT TO COMPACTS AND AGREEMENTS IN VARIOUS FORMS

Petitioner Northeast Bancorp's startling claim that "congressional approval of an interstate compact must be made explicitly and with full knowledge of its ram-

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disposal); 33 U.S.C. § 1253 (requiring consent to interstate water pollution abatement compacts).

Despite *Multistate*'s confirmation of the very limited scope of the Compact Clause as an independent constraint on cooperative state action, Congress' consent may still be sought out of an excess of caution or to avoid questions under the Commerce Clause. *Cf.* Engdahl, *supra* note 22, at 102; Zimmerman & Wendell, *Law & Use, supra* note 22, at 23. Any rule that imputes dispositive significance to congressional inaction would thus place an even greater burden on that already overworked body.

[55] Petitioners' principal effort to show an encroachment on federal supremacy under *Multistate* is to argue a conflict with the Garn-St Germain Depository Institutions Act of 1982, which provides for interstate acquisitions of failing thrifts. 12 U.S.C. § 1823(f). But it is the Douglas Amendment, not state law, that generally prohibits interstate bank acquisitions and thus would stand as an obstacle to interstate mergers between healthy and failing thrifts. Accordingly, Congress was careful to insert a provision in Garn-St Germain creating an exception to the Douglas Amendment prohibition on Federal Reserve Board approvals of interstate mergers and acquisitions, and specifically preempting any conflicting law, state or federal. 12 U.S.C. § 1823(f)(4)(i). This preemption provision itself evidences Congress' awareness of the varying state exercises of Douglas Amendment power and a willingness to preserve such laws, except to the extent they conflict with federal efforts to rescue failing thrifts. In view of these provisions, the FDIC has ample power to arrange mergers without regard to the provisions of state law, and the Connecticut and Massachusetts statutes cannot undermine this federal policy.

ifications," Northeast Bancorp Brief at 38, calls for refutation. This Court has recently reaffirmed that

> Congress may consent to an interstate compact by authorizing joint state action *in advance or by giving express or implied approval* to an agreement the States have already joined.

Cuyler v. Adams, 449 U.S. 433, 441 (1981) (emphasis added).[56] Congress has exercised its power of blanket advance consent on numerous occasions, and very broadly. In 1934, for example, Congress authorized any two or more states to make compacts for the general purpose of crime prevention and aiding in the enforcement of their criminal laws.[57] Pursuant to this very broad and general authorization, years later states subscribed to the Interstate Agreement on Detainers (initially drafted in 1956), the Interstate Compact on Juveniles (initial state adoption in 1955), and the New England Corrections Compact (initial state adoption in 1960).[58]

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[56] *Accord Virginia v. Tennessee*, 148 U.S. 521 (1893) (upholding implied consent to boundary compact); *see North Carolina v. Tennessee*, 235 U.S. 1, 15-16 (1914); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 86-87 (1823). *See also* Zimmerman & Wendell, *Law & Use*, *supra* note 22, at 21.

[57] 48 Stat. 909 (1934), *codified at*, 4 U.S.C. § 112.

[58] *See* Council, *Interstate Compacts*, *supra* note 22, at 7-8. Similar advance approvals for state compacts have been given with respect to the construction of bridges, General Bridge Act of 1946, 60 Stat. 847 (1946), and for encouraging highway safety. *See* Act of Aug. 20, 1958, Pub. L. No. 85-684, 72 Stat. 635, *as amended*, Act of Aug. 20, 1964, Pub. L. No. 88-466, 78 Stat. 564. Pursuant to the latter, states have widely subscribed to the Driver License Compact, the Nonresident Violator Compact of 1977 and the Vehicle Equipment Safety Compact. *See generally* Council, *Interstate Compacts*, *supra* note 22, at 13-24. *See also Deveau v. Braisted*, 363 U.S. 144, 154 (1960) (Congress, in approving New York-New Jersey Waterfront Compact, expressly consented to implementing legislation to be subsequently adopted by the participating states). *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in* Interstate Adjustments, 34 Yale L.J. 685, Appendix A (1925) (advance approval given as early as 1861).

This varied congressional practice [59] itself refutes Petitioner's suggestion that Congress must act formally and specifically with respect to each individual compact in order to afford sister states a congressional forum in which to raise objections to proposed agreements or compacts. Any interests of sister states injured by state legislation pursuant to implicit or advance consents under the Compact Clause may be brought to Congress' attention, and remedied through Congress' broad constitutional powers. *Cf. Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856) (Congress does not restrict its own powers under Interstate Commerce Clause by consenting to a compact).[60]

This case presents no occasion to consider the degree or form of consent required to sustain a compact or agreement under the Compact Clause, or to revisit the rule that the consent need not take any specific form and may be given in advance or arise by implication. For, as shown in earlier sections, the reciprocal statutes of Massachusetts and Connecticut are not in fact an agreement or compact to exclude other states, and do not enhance the political power of those states or other New England states. Most important, they do not encroach upon the "just supremacy" of the United States in view

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[59] The exact nature of Congress' formal approval of state compacts and agreements has varied as well. *See* The Constitution of the United States of America: Analyses and Interpretations, S. Doc. No. 82, 92d Cong., 2d Sess. 421-22 (1973). In one instance, at least, Congress gave approval in advance to compacts filed with both Houses, subject to a power within 60 days to disapprove. Celler, *supra* note 54, at 686-87 (discussing Civil Defense Act of 1951). The willingness of past courts and congresses to view the consent requirement with flexibility is consistent with the fundamental purpose of the clause—to protect the political supremacy of the United States.

[60] *See also Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962) (Congress has "abundant authority to supervise and regulate the activities of operational compacts in such a way as to ensure that no violence is done by these compacts to more compelling federal concerns.").

of the federal renunciation of interest in controlling state policies with respect to interstate bank acquisitions found in the Douglas Amendment to the Bank Holding Company Act.

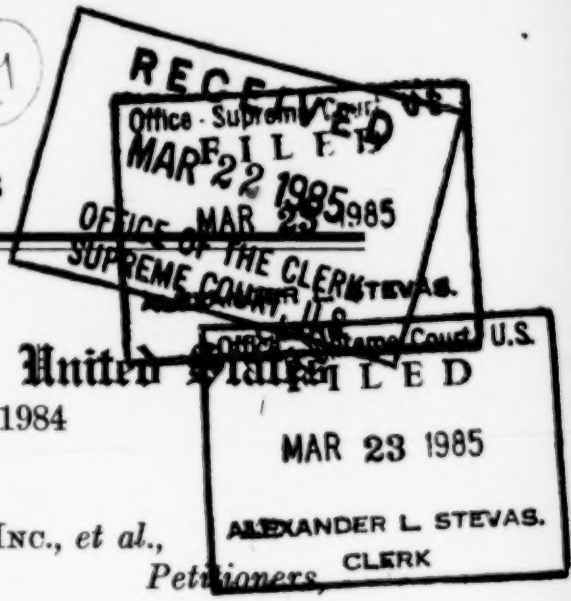
CONCLUSION

For all these reasons, the judgment and decision of the Court of Appeals should be affirmed.

Respectfully submitted,

VICKI C. JACKSON
JAMES E. PFANDER
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464
Of Counsel

JOYCE HOLMES BENJAMIN
THE STATE AND LOCAL
LEGAL CENTER
Suite 349
444 North Capitol St., N.W.
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae



No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., *et al.*,
Petitioners,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

ERWIN N. GRISWOLD*
JAMES F. BELL
ARTHUR E. WILMARTH, JR.

JONES, DAY, REAVIS & POGUE
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act (the "Douglas Amendment"), which prohibits any bank holding company from acquiring a bank located in another state unless such acquisition is "specifically authorized" by the statutory law of the bank's home state, grants to each state broad authority to determine the degree to which out-of-state bank holding companies may acquire banks located within its borders.

2. Whether the Court below correctly determined that Connecticut and Massachusetts acted within the scope of authority granted by the Douglas Amendment, and therefore did not violate the Commerce Clause, when they each adopted statutes permitting an out-of-state bank holding company to acquire an in-state bank if such holding company is located in another New England state which affords reciprocal privileges to bank holding companies headquartered in the enacting state.

3. Whether the Court below correctly decided that the Connecticut and Massachusetts statutes are valid exercises of the authority granted to the states by Congress under the Douglas Amendment and therefore do not encroach upon the supremacy or structure of the federal government in violation of the Compact Clause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC., *et al.*,
Petitioners,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

INTEREST OF *AMICUS CURIAE*

This brief is filed by the Conference of State Bank Supervisors (the "Conference"), with the consent of all parties,[1] in support of the Respondents. The Conference is the professional association of state government officials responsible for regulating more than 10,000 state-chartered banking institutions, with total assets of approximately $1 trillion, in the 50 states and in Guam, Puerto Rico and the Virgin Islands.[2] As the organizational representative of

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[1] Letters indicating the consent of all parties to the filing of this brief have been filed with the Clerk.

[2] In 1958, the Conference invited state-chartered banks to become "associate members," and there are currently about 5,000 such associate mem-

state banking commissioners, the Conference has a vital interest in the outcome of this case, because Petitioners' challenge, if upheld, would seriously undermine the authority of the states to regulate acquisitions of banks within their respective borders by out-of-state bank holding companies, pursuant to Section 3(d) of the Bank Holding Company Act, 12 U.S.C. §1842(d) (the "Douglas Amendment").

Ten states (including Connecticut and Massachusetts, whose statutes are challenged by Petitioners) have enacted regional interstate banking laws. Numerous other states are considering the adoption of similar statutes. In addition, twelve states have adopted laws which permit acquisitions of in-state banks by out-of-state bank holding companies subject to functional or other non-geographic limitations, and the validity of these laws would also be placed in doubt if Petitioners succeed in their challenge to the constitutionality of the Connecticut and Massachusetts statutes.[3] Because Petitioners' challenge would deprive the states of the broad authority which Congress intended to confer upon them under the Douglas Amendment,[4] the Conference is participating in this case to defend the regulatory jurisdiction of its member commissioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Citicorp, Northeast Bancorp, Inc. ("Northeast") and Union Trust Company ("Union Trust") are challenging the decision below,[5] which upheld the constitutionality of regional interstate banking laws enacted by Connecticut and Massachusetts. Each of the challenged

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bers. Associate members, however, may not vote at meetings of the Conference and therefore do not vote on decisions or policies of the Conference.

[3] *See* notes 83-86, *infra*, and accompanying text.

[4] *See* Argument, Part II(B) and (C), *infra*.

[5] *Northeast Bancorp, Inc.* v. *Board of Governors of Federal Reserve System*, 740 F.2d 203 (2d Cir. 1984) (Pet. App. A21-A33), *cert. granted*, 105 S.Ct. 776 (1985).

statutes provides that an out-of-state bank holding company may acquire an in-state bank if (i) the out-of-state holding company is located in another state within the New England region, and (ii) such other state provides reciprocal privileges to bank holding companies located in the enacting state.[6]

Petitioners argue that the New England regional restriction contained in the challenged statutes discriminates against states outside the region (especially with reference to New York) in violation of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). In addition, Petitioners maintain that the Connecticut and Massachusetts statutes constitute an interstate "compact" which encroaches upon the supremacy and structure of the federal government in violation of the Compact Clause (U.S. Const. art. I, § 10, cl. 3).

Petitioners' arguments are unsound and should not prevail. The challenged statutes (and state regional banking laws in general) are valid exercises of the authority granted *by Congress* to the states under Section 3(d) of the Bank Holding Company Act ("BHC Act"), popularly known as the Douglas Amendment.[7] The Douglas Amendment, which was enacted as part of the original BHC Act in 1956, prohibits every bank holding company from acquiring a bank located in a state other than the state in which the holding company's principal banking subsidiaries are situated, *unless* such acquisition

> . . . is *specifically authorized* by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. [Emphasis added.]

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[6] 1983 Conn. Pub. Acts 411 (Reg. Sess.), § 2, *as amended by* 1984 Conn. Pub. Acts 329 (Reg. Sess.), § 1; Mass Gen. Laws Ann. ch. 167A, § 2 (West 1971 and Supp. 1984).

[7] The parties do not appear to dispute that regional banking laws are constitutional if they operate within the scope of authority granted to the

The express terms of the Douglas Amendment do not contain *any* limitation that would bar the states from authorizing out-of-state bank holding companies to acquire in-state banks subject to a regional restriction. Nor is any such limitation suggested by the legislative history of the Douglas Amendment. On the contrary, Senator Douglas stated that his Amendment would "permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them*".[8]

Thus, Petitioners are attempting to graft a limitation onto the authority given to the states under the Douglas Amendment when no such limitation appears in either the language or legislative history of the statute. They commit further error by ignoring the basic rule of statutory construction that a law must be construed in accordance with its historical context and policy.[9] Instead, they begin from a hypothetical premise *of their own making—viz.*, that there should be free and unrestrained "interstate banking" in the United States, and, therefore, that the Connecticut and Massachusetts statutes are "protectionist statutes . . . that intentionally discriminat[e] against commerce from excluded states."[10]

Such a premise is contrary to the manner in which Congress has *actually* regulated banking in the United States, both historically and currently. Congess has consistently deferred to *state law* in numerous provisions of the federal

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states under the Douglas Amendment. *See, e.g.*, Brief for Petitioner Citicorp at 15; Brief for Petitioners Northeast and Union Trust at 12; Brief for the Federal Respondent in Opposition to the Petition for Certiorari, at 14.

[8] 102 Cong. Rec. 6858 (1956) (emphasis added).

[9] *See, e.g., Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970); 2A Sutherland, *Statutes and Statutory Construction*, § 45.10 (N. Singer rev. 4th ed. 1984).

[10] Brief for Citicorp at 11. *See also* Brief for Northeast and Union Trust at 2-3.

statutes governing national banks and bank holding companies.[11] Congressional deference to the states has been most complete in matters involving *banking structure, viz.*, the branching of national banks under the McFadden Act and the interstate expansion of bank holding companies under the Douglas Amendment.

In short, "interstate banking"—in the sense of interstate acquisitions of banks by bank holding companies—does *not* exist in this country *except as permitted by the states* under the Douglas Amendment.[12] Indeed, the business of banking is "unique among major American businesses" in that banks may not operate or be acquired across state lines without state authorization.[13]

In view of the terms and historical context of the Douglas Amendment, it is clear that the Connecticut and Massachusetts laws operate within the scope of authority granted by Congress to the states. Accordingly, these state laws do not

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[11] *See, e.g., Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 962 (1976); *Iowa Independent Bankers* v. *Board of Governors of Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975) (*"Iowa Independent Bankers"*) at 1291-92, 1296-97.

As the Third Circuit Court of Appeals has said:

> Whatever may be the history of federal-state relations in *other* fields, *regulation of banking has been one of dual control* since the passage of the first National Bank Act in 1863.

National State Bank v. *Long*, 630 F.2d 981, 985 (3d Cir. 1980) (emphasis added).

[12] As described below (*see* notes 50-58, *infra*, and accompanying text), twenty-two states (including Connecticut and Massachusetts) have adopted laws which permit out-of-state bank holding companies, under varying circumstances, to acquire in-state commercial banks. Under the Douglas Amendment, interstate bank acquisitions could *not* occur *without* these state laws. Thus, as the Court below said, 740 F.2d at 208 (Pet. App. A29), "the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it."

[13] Ginsburg, "Interstate Banking," 9 Hofstra L. Rev. 1133, 1137, 1167-68 (1981).

violate the Commerce Clause. Moreover, because Congress itself has authorized the states to regulate interstate acquisitions of banks by bank holding companies, the challenged statutes do not intrude upon any area of federal supremacy in violation of the Compact Clause.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS CONSISTENTLY DEFERRED TO STATE CONTROL OF BANKING STRUCTURE, PARTICULARLY UNDER THE DOUGLAS AMENDMENT

In its seminal decision concerning the authority of the states to regulate branching by national banks under the McFadden Act, 12 U.S.C. § 36, this Court carefully examined the history of banking in the United States leading up to the passage of that Act.[14] After reviewing this history, this Court concluded that, under the McFadden Act, national banks may establish branches " 'only to the extent that State laws permit branch banking.' " [15] The Conference believes that a similar inquiry is appropriate here in evaluating the authority given to the states, under the Douglas Amendment, to regulate a related area of banking structure, *viz.*, the acquisition of banks by out-of-state bank holding companies. As shown below, such an inquiry reveals that, in line with Congress' long-standing determination that *state* regulation of banking structure would ensure a *decentralized* banking system, Congress has deliberately empowered *the states* under the Douglas Amendment, to determine the extent to which out-of-state bank holding companies may acquire banks within their respective borders.

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[14] *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) (*"Walker Bank"*), at 256-60.

[15] *Id.* at 261.

A. Federal Deference to State Control of Banking Structure from the Second Bank of the United States through the McFadden Act, as amended in 1933

1. President Jackson's Veto of the Rechartering of the Second Bank of the United States

Prominent among those who supported President Andrew Jackson's veto of the rechartering of the Second Bank of the United States in 1832 were the owners of state banks—both in the East and in the West—who resented the Second Bank's exclusive control over the nation's currency and, thereby, the effective allocation of credit resources. Moreover, state banks were the direct beneficiaries of Jackson's decision in 1833 to remove the federal government's deposits from the Second Bank and place them in selected state banks.[16]

Jackson and his supporters—including Roger B. Taney—viewed the Second Bank as a dangerous center of concentrated financial power which threatened political and social democracy.[17] Accordingly, the fight against the Second Bank led naturally to the state "free banking" movement which began in the late 1830's. As typified by New York's banking law of 1838, "free banking" statutes permitted state banks to be chartered under general rules of incorporation rather than requiring special acts of the legislature. The intent of these state laws was "to encourage the growth of banking, but at the same time . . . to prevent the concentration of banking power." [18]

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[16] R. Hofstadter, *The American Political Tradition* 72-81 (Vintage ed. 1974); A. Schlesinger, Jr., *The Age of Jackson* 74-80, 90-93, 97-102 (1945).

[17] Hofstadter, *supra* note 16, at 74-79; Schlesinger, *supra* note 16, at 89-94, 97-102, 105-10.

[18] Golembe, "Our Remarkable Banking System," 53 U.Va.L.Rev. 1091, 1096 (1967). *See also* Hofstadter, *supra* note 16, at 81-82.

2. The National Bank Act of 1864

Following the expiration of the Second Bank's charter in 1836, the federal government did not again enter the bank chartering field until the Civil War. During the interim period, the states were the exclusive chartering and regulatory authorities for banks. In 1863, responding to problems encountered in financing the war effort, Congress enacted the National Currency Act—replaced by the National Bank Act of 1864—to authorize a system of federally-chartered but privately-owned national banks which would issue a new national paper currency.[19]

The National Bank Act did not give the new national banks any express branching authority, a situation which by the 1920's placed them at a serious competitive disadvantage with state banks in states which permitted branching.[20] Moreover, in 1924 this Court held that national banks were subject to state laws restricting or prohibiting branching by *state* banks.[21] That decision confirmed that, under existing legislation, *state* law effectively governed the nation's banking structure.

3. The McFadden Act and the Banking Act of 1933

In response to the competitive inequality faced by national banks with respect to branching, Congress adopted the McFadden Act of 1927,[22] which authorized national banks to establish branches within the municipality where their main banking facilities were located. However, the McFadden Act provided that national banks could establish such branches *only if permitted by state law.*[23]

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[19] Ginsburg, *supra* note 13, at 1139-41; Golembe, *supra* note 18, at 1094-97.

[20] Ginsburg, *supra* note 13, at 1152-53.

[21] *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924).

[22] Act of Feb. 25, 1927, c. 191, § 7, 44 Stat. 1228, *codified at* 12 U.S.C. § 36.

[23] *Id. See also* S. Rep. No. 473, 69th Cong., 1st Sess. 14 (1926), *quoted in Walker Bank*, 385 U.S. at 258.

During the Depression, the Comptroller of the Currency (the regulator of national banks) and others argued that the McFadden Act should be amended to authorize national banks to branch *regardless of state law.* They contended that smaller rural banks were undercapitalized and should be replaced by branches of larger banks.[24] In accordance with this view, Senator Carter Glass of Virginia introduced a bill in 1932 which would have authorized national banks to establish branches outside their home city (i) at any point within their home state, *"irrespective of State laws,"* and (ii) at any point in *contiguous* states within 50 miles of their main office.[25]

Senator Glass' bill was strongly opposed on the ground that it would deprive the states of their control over banking structure and result in a greater concentration of banking resources.[26] Because of this opposition, the bill was defeated in the House. When Senator Glass introduced a new bill in 1933, it contained a branching provision (adopted as Section 23 of the Banking Act of 1933)[27] which allowed national banks to establish branches only *within* their home state and, even there, *"only to the extent that the State laws permit branch banking."*[28] Thus, the McFadden Act, as amended in 1933, firmly established *state* control over branching by national banks.

B. Congressional Establishment of State Control over Interstate Bank Acquisitions under the Douglas Amendment

1. The House and Senate Committee Proposals for Bank Holding Company Legislation

In the early 1950's, supporters of the decentralized dual banking system became concerned with the growth of multi-

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[24] *See Walker Bank,* 385 U.S. at 259.

[25] S. Rep. No. 584, 72d Cong., 1st Sess. 11, 16 (1932).

[26] *E.g.,* S. Rep. No. 584, 72d Cong., 1st Sess. Part II (1933) (Minority Views) at 3-5.

[27] Act of June 16, 1933, c. 89, § 23, 48 Stat. 189, *codified* at 12 U.S.C. § 36(c) and (d).

[28] 76 Cong. Rec. 2511 (1933), *quoted in Walker Bank,* 385 U.S. at 259.

bank holding companies. In particular, the owners of "independent" unit banks complained that holding companies were evading state branching laws by creating numerous subsidiary banks, both within and across state lines, and then operating such banks in a unitary fashion similar to branches.[29]

In response to these complaints, the House Banking and Currency Committee proposed a bill to control bank holding companies (H.R. 6227), which was passed by the full House in 1955. Section 5(c) of H.R. 6227 would have prohibited bank holding companies from acquiring any additional banks outside their home state, or from making further home state acquisitions except in areas where bank branching was permitted or where holding company acquisitions were authorized by state law.[30]

The Senate Committee on Banking and Currency agreed with the House that a federal law regulating bank holding companies was needed,[31] but took a different approach with respect to bank acquisitions. Instead of adopting an absolute federal prohibition against holding company acquisitions across state lines or within states where branching was not permitted, the Senate Committee's bill (S. 2577)

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[29] *See, e.g., Control and Regulation of Bank Holding Companies: Hearings on S. 2674 before the House Comm. on Banking and Currency*, 84th Cong., 1st Sess. (1955) (*"1955 House Hearings"*) at 153-63 (testimony of W. J. Bryan, president, Independent Bankers Ass'n of America) and 163-73 (testimony of H. J. Harding, president, Independent Bankers Ass'n, 12th Federal Reserve District); *Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 before a Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. (1955) (*"1955 Senate Hearings"*) at 104-131 (testimony of Messrs. Bryan and Harding).

[30] H.R. 6227, 84th Cong., 1st Sess., § 5(c) (1955), *reprinted in 1955 Senate Hearings, supra* note 29, at 25. *See also* H.R. Rep. No. 609, 84th Cong., 1st Sess. 15, 24 (1955).

[31] *See* S. Rep. No. 1095, 84th Cong., 1st Sess. (1955), *reprinted in* 1956 U.S. Code Cong. & Ad. News 2482 at 2483.

provided that such acquisitions would be allowed, subject to prior Federal Reserve Board approval.[32]

2. Congressional Adoption of the Douglas Amendment

With respect to interstate acquisitions of banks by bank holding companies, the American Bankers Association ("ABA") did not favor either the House bill or the Senate Committee bill. Instead, the ABA proposed a compromise which would establish a general federal prohibition against such acquisitions but would *also* allow *each State* to lift such prohibition and allow one or more out-of-state bank holding companies to acquire in-state banks.[33]

The ABA compromise position was similar to a floor amendment proposed by Senator Paul Douglas of Illinois during the Senate debates on S. 2577.[34] Senator Douglas' amendment, which was enacted as Section 3(d) of the original BHC Act of 1956, provided that no bank holding company could acquire a bank located in a state other than the state in which the holding company's principal place of business was situated or its "principal operations" were conducted, *unless* such acquisition was "specifically authorized" by the statutory law of such other state.[35]

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[32] *Id.* at 2489-93. The Senate Committee also contemplated that states could *affirmatively prohibit* acquisitions of banks by bank holding companies, either within or across state lines, under Section 7 of S. 2577, which was adopted as Section 7 of the BHC Act. *See* 102 Cong. Rec. 6751-53 (remarks of Senator Robertson, chief sponsor and floor manager of S. 2577); *id.* at 6855 (remarks of Senators Robertson and Capehart).

[33] *1955 House Hearings, supra,* note 29, at 406 (testimony of G. R. Boyles on behalf of the ABA); *1955 Senate Hearings, supra* note 29, at 289 (supplemental statement of Mr. Boyles on behalf of the ABA).

[34] See 102 Cong. Rec. 6860 (1956). The Senate debates on the Douglas Amendment are set forth *id.* at 6760-61, 6856-63. Senator Douglas had previously offered his amendment before the Senate Committee, but it was defeated by a vote of 6-4. *Id.* at 6760, 6862.

[35] *Id.* at 6857. The Douglas Amendment was supported by both the ABA and the independent bankers. *Id.* at 6760 (remarks of Senator Robertson); 6860 (remarks of Senator Douglas).

Senator Douglas declared that his amendment would carry out the long-established federal policy against the undue concentration of financial resources, in order to ensure both political liberty and economic competition:

> [S. 2577], and [our] amendment . . . , are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power, and instead to keep the private control of credit diffused as much as possible.
>
> . . . .
>
> Andrew Jackson realized all this when he faced Nicholas Biddle and the Second Bank of the United States. . . . [Jackson] wanted credit and banking to be decentralized and diffused so that men might be free.[36]

Senator Douglas pointed out that where banking resources had become concentrated in a few giant banks—as in Canada, Great Britain and Germany—competition had diminished and industry had become concentrated. Therefore, he argued, S. 2577 and his amendment were needed to "check and, if possible, to roll back the concentration of banking and credit" in the United States.[37]

Senator Douglas also emphasized that his amendment would prevent bank holding companies from evading *state* limitations on bank expansion:

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[36] 102 Cong. Rec. 6857 (1956).

[37] *Id. See also id.* at 6861-62 (statement by Senator Payne and remarks by Senator Morse). In part because of the Douglas Amendment, the American banking industry is highly decentralized, with a large number of banks of varying sizes, designed to serve the needs of both urban and rural communities and small as well as large businesses. As of December 31, 1983, there were 14,890 commercial banks in the United States, including 4,751 national banks and 10,139 state banks. Federal Deposit Ins. Corp., *Changes among Operating Banks and Branches, 1983*, at 4 (1984). Even among the largest 300 U.S. commercial banks, the total deposits held by each bank, as of December 31, 1984, ranged from $757 million (Summit Bank, Fort Wayne, Ind.) to over $79 billion (Citibank) and over $88 billion (Bank of America). "The Top 300 Banks in the United States," Am. Banker, Mar. 15, 1985, at 44.

> [O]ur amendment aims . . . to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, *our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them;* and that is the provision of the McFadden Act.
>
> . . . .
>
> [Our amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy . . . .[38]

Certain Senators *opposed* the Douglas Amendment because it would result in discrimination against interstate commerce. For example, Senator Bennett of Utah argued that the Amendment would

> . . . require every State that does not now have legislation prohibiting bank holding companies to *discriminate* in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the *discrimination.*[39]

Senator Bennett further contended that "[f]or Congress to *require discrimination in interstate commerce,* and then leave it to *the several States to correct it,* is a strange approach".[40] Nevertheless, his arguments were *rejected* and the Douglas Amendment was adopted by an overwhelming 58-18 vote of the Senate,[41] and received House approval.[42]

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[38] *Id.* at 6858 (emphasis added), 6860.

[39] *Id.* at 6860 (emphasis added). *See also id.* at 6862 (remarks of Senator Bricker).

[40] *Id.* at 6860 (emphasis added).

[41] *Id.* at 6863. In addition, of the nine absent and nonvoting Senators who indicated their views on the Douglas Amendment, seven supported the Amendment. *Id.*

[42] *Id.* at 7165.

C. Subsequent Congressional Reaffirmations of State Authority under the Douglas Amendment

On several occasions since 1956, Congress has reconsidered the policy on interstate bank acquisitions set forth in the Douglas Amendment. In each instance, Congress has *confirmed* the states' authority to control the extent to which bank holding companies may acquire banks across state lines, and Congress has also *rejected* proposals to rescind or substantially modify the Douglas Amendment.

In 1966, Congress modified the Douglas Amendment by providing that the "home state" of each bank holding company would be the state in which its operations are "principally conducted" (defined as the state in which the total deposits of the holding company's banking subsidiaries are the largest). The 1966 amendment removed the previous alternative reference to the "principal office and place of business" of a bank holding company.[43] It thereby precluded the possibility that a holding company might establish its principal office in one state and its principal operations in another, and then claim that it had *two* "home states" in which it could acquire banks without state approval.[44] Thus, the 1966 amendment reiterated Congress' intent to prohibit bank holding companies from acquiring banks in more than one state without state permission.

Congress again considered the regulation of bank expansion under the McFadden Act and the Douglas Amendment when it adopted the International Banking Act of 1978 ("IBA").[45] Under Section 14 of the IBA, Congress directed President Carter to submit recommendations to Congress

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[43] Act of July 1, 1966, Pub. L. No. 89-485, § 7(d), 80 Stat. 237.

[44] *See* S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385 at 2393.

[45] Act of Sept. 17, 1978, Pub. L. No. 95-369, 92 Stat. 607. *See* S. Rep. No. 1073, 95th Cong., 2d Sess. 6-12 (1978).

"with regard to the applicability of the McFadden Act to the current banking structure."[46]

President Carter's report to Congress recommended sweeping changes in the Douglas Amendment (as well as proposed amendments to the McFadden Act) which would have *removed* most state authority to regulate interstate acquisitions of banks by bank holding companies.[47] However, Congress has adopted *only* the *most limited* proposal of the report—*viz.*, the authorization of interstate acquisitions of large failed banks without state approval—and only for a period of three years ending October 15, 1985.[48] Moreover, this limited authorization contains several conditions designed to *preserve* a substantial degree of *state* determination over acquisitions of failed banks.[49] In

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[46] *Id.* at 19.

[47] *Geographic Restrictions on Commercial Banking in the United States: The Report of the President* (Treas. Dept. 1981). The Report recommended three substantial modifications of the Douglas Amendment and the McFadden Act; (i) that interstate acquisitions of banks by bank holding companies be permitted *regardless of state law* (although at first only on a regional basis); (ii) that, over time, national banks should be permitted, *without* state approval, to deploy EFT (electronic funds transfer) terminals nationwide and to establish interstate brick-and-mortar branches within "natural market areas" (*e.g.*, metropolitan areas); and (iii) that interstate acquisitions of "failing banks" by bank holding companies should be allowed without state permission. *Id.* at 17-20.

[48] Section 116 of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 116, 96 Stat. 1476, *codified at* 12 U.S.C. § 1823 (f), authorizes the Federal Deposit Insurance Corporation ("FDIC") to approve, without state permission, the acquisition of a failed bank having total assets of $500 million or more by an out-of-state bank holding company.

[49] In evaluating bids by bank holding companies for a failed bank, the FDIC must give priority to bidders located within the *same* state as the bank, or (if an out-of-state bidder is to be chosen) to bidders located in *adjacent* states. In addition, if the responsible state bank supervisor objects to such an acquisition, the FDIC may approve the acquisition only by a unanimous vote of its Board of Directors. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 5-6, 47 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad.

short, Congress has *refused* to deprive the states of the broad authority conferred upon them under the Douglas Amendment.

D. The States Have Enacted Numerous Statutes pursuant to the Douglas Amendment, and These Statutes Have Been Upheld by the Federal Reserve Board

Beginning in 1972, 22 states have adopted statutes pursuant to the Douglas Amendment which permit varying degrees of entry by out-of-state bank holding companies. Four states (beginning with Iowa in 1972) have enacted "grandfather" statutes, which permit bank acquisitions only by out-of-state bank holding companies which had a specified type of presence in the state on a stipulated date.[50]

In addition, beginning in 1980, six states have adopted "limited purpose" interstate banking laws. These laws generally permit an out-of-state bank holding company to acquire a single in-state bank to carry on a limited type of business (usually the issuance of credit cards). Such statutes also may require the limited-purpose bank to employ a minimum number of state residents and to operate at a single location in a manner which does not attract customers of local banks.[51] In addition, four states have authorized out-of-state bank holding companies to acquire failed commercial banks subject to specified conditions.[52]

News 3054 at 3059-60, 3101; S. Rep. No. 641, 97th Cong., 2d Sess. 85-86 (1982) (Conf. Rep.), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3128 at 3128-29.

[50] Fla. Stat. Ann. § 658.29(3)(d); Ill. Rev. Stat. ch. 17, § 2510; Iowa Code Ann. § 524.1805; Neb. Rev. Stat. § 8-903 (Supp. 1983); Utah Code Ann. § 7-3-2(4) (Supp. 1984).

[51] Del. Code Ann. tit. 5, § 803; Md. Fin. Inst. Code Ann. §§ 5-901 to 5-908; Neb. Rev. Stat. § 8-1512 (Supp. 1983 and 1984); Nev. Rev. Stat. ch. 666.132 (Cum. Supp. 1984); S.D. Codified Laws Ann. §§ 51-16-40 through 51-16-47 (Supp. 1984); Va. Code §§ 6.1-390 through 6.1-397.

[52] Ill. Rev. Stat. ch. 17, § 2508 (Supp. 1984-85); 1985 Ore. Laws ch. 12; Utah Code Ann. § 7-19-1 (Supp. 1984); Wash. Rev. Code Ann. §30.04.230 (Supp. 1985).

Two states—Alaska and Maine—permit acquisitions of in-state banks by any out-of-state bank holding company, but impose certain conditions on such acquisitions.[53] Similarly, New York does not allow an out-of-state bank holding company to acquire a New York bank *unless* that holding company's home state provides *reciprocal* privileges to New York bank holding companies.[54]

On December 30, 1982, Massachusetts adopted the first regional interstate banking law.[55] In 1983, Connecticut and Rhode Island enacted laws similar to the Massachusetts statute, although the regional limitation in the Rhode Island statute expires on July 1, 1986.[56] Four Southeastern states have subsequently adopted laws authorizing interstate acquisitions within the Southeastern region.[57] Kentucky, Oregon and Utah have also enacted interstate laws with regional limitations.[58] Approximately twenty other states and the District of Columbia are likely to consider regional banking legislation in 1985.[59]

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[53] Maine imposes minimum capitalization requirements on banks which are acquired by out-of-state holding companies and requires such an acquisition to bring "net new funds" into Maine. Alaska permits out-of-state holding companies to acquire only banks which were established prior to July 1, 1982. Me. Rev. Stat. Ann. tit. 9B, § 1013 (Supp. 1984); Alaska Stat. § 06.05.235.

[54] N.Y. Banking Law § 142-b (McKinney Supp. 1983).

[55] Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 and Supp. 1984).

[56] 1983 Conn. Pub. Acts 411 (Reg. Sess.), § 2, as amended by 1984 Conn Pub. Acts 329 (Reg. Sess.), § 1; R.I. Gen. Laws §§ 19-30-1 and 19-30-2 (Supp. 1983).

[57] Fla. Stat. Ann. § 658.295 (West Supp. 1984), Ga. Code § 7-1-620, *et seq.* (Supp. 1984), N.C. Gen. Stat. §§ 53-209 to 53-218 (Interim Supp. (1984); S.C. Code tit. 34, ch. 24 (Supp. 1985). These statutes are not identical. For example, the Georgia law does not include Arkansas, Maryland, West Virginia and the District of Columbia within the defined region for reciprocal acquisitions.

[58] Ky. Rev. Stat. § 287-900, *et seq.* (Cum. Supp. 1984); 1985 Ore Laws ch. 12; Utah Code Ann. §§ 7-1-102 and 7-1-702 (Supp. 1984).

[59] *See* Sudo, "Interstate Bills Dominate State Slates in '85," Am. Banker, Dec. 28, 1984, at 1, col. 2.

The Federal Reserve Board has consistently given effect to state-adopted interstate banking laws with "grandfather,"[60] "limited purpose,"[61] and "failed bank" limitations.[62] Moreover, in a series of three decisions upheld by the Court below, the Board approved acquisitions pursuant to the Connecticut and Massachusetts statutes.[63] The Board's assessment of the validity under the Douglas Amendment of state-adopted interstate banking laws, including regional banking laws, is entitled to the "greatest deference" in view of the Board's primary responsibility for interpreting and applying the BHC Act.[64]

II. STATE REGIONAL BANKING LAWS ARE AUTHORIZED BY THE DOUGLAS AMENDMENT AND THEREFORE DO NOT VIOLATE THE COMMERCE CLAUSE

This Court held in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), that the Commerce Clause applies

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[60] *E.g., Northwest Bancorporation*, 38 Fed. Reg. 21530 (1973), *aff'd sub nom. Iowa Independent Bankers, supra* note 11 (Iowa law); *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982) (Florida law).

[61] *E.g., Citicorp*, 67 Fed. Res. Bull. 181 (1981) (South Dakota law); *Citicorp*, 71 Fed. Res. Bull. 101 (1985) (Nevada law).

[62] *E.g., BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983) (Washington law).

[63] *Bank of New England Corp.*, 70 Fed. Res. Bull. 374 (1984); *Hartford National Corp.*, 70 Fed. Res. Bull. 353 (1984); *Bank of Boston Corp.*, 70 Fed. Res. Bull. 524 (1984). *See* Pet. App. A34-A86. Since the decision below, the Board has approved further acquisitions under the Rhode Island, Florida and Georgia statutes. *E.g., Hartford National Corp.*, 71 Fed. Res. Bull. 43 (1985); *SunTrust Banks, Inc.*, 71 Fed. Res. Bull. 176 (1985).

The Board also *denied* an application by Bank of New York Company, Inc., a New York bank holding company, to acquire Petitioner Northeast, a Connecticut bank holding company, in violation of the regional limitation contained in the Connecticut statute. *Bank of New York Co.*, 70 Fed. Res. Bull. 527 (1984).

[64] *E.g., Board of Governors of Federal Reserve System* v. *Investment Co. Institute*, 450 U.S. 46, 56-57 (1981); *Board of Governors of Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978).

to state regulation of nonbanking financially-related services provided by bank holding companies. However, the Court also pointed out that Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Id.* at 44. In this case, it is clear from both the terms and legislative history of the Douglas Amendment that Congress *has* authorized the states to adopt regional banking laws. Accordingly, such laws do not violate the Commerce Clause.

A. Petitioners' Argument that the States Must Show "Specific" Congressional Authorization for Regional Banking Laws Is Contrary to the Decisions of this Court

Petitioners claim that the Douglas Amendment does not represent "specific Congressional authorization for . . . concerted, discriminatory state statutes." They argue that Congress must have "deliberately and specifically authorized the *particular* deviation from the constitutional mandate" which is at issue, and that "the Douglas Amendment says nothing about groups of states joining together to discriminate against commerce deriving from disfavored sister states." [65]

Petitioners' analysis is directly contrary to the approach taken by this Court in determining whether Congress has authorized the states to regulate an area of interstate commerce. This Court has said that Congress must "affirmatively contemplate" state regulation of interstate commerce in order to immunize it from scrutiny under the Commerce Clause.[66] However, rather than requiring "specific" authorization for each "particular [state] deviation" from the Commerce Clause—as Petitioners argue—

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[65] Brief for Citicorp at 18, 22-23 (emphasis added). *See also* Brief for Northeast and Union Trust at 22-23, 26.

[66] *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984).

this Court has held that if Congress *generally* authorizes the states to regulate a defined field of commerce, *all* state regulation pursuant to such authority is valid under the Commerce Clause:

> If Congress ordains that the States may freely regulate an aspect of interstate commerce, *any action taken by a state within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.*[67]

In *Western & Southern Life,* as well as its earlier decision in *Prudential Insurance Co.* v. *Benjamin,*[68] this Court determined that "Congress removed all Commerce Clause limitations on the authority of the states to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."[69] This Court particularly relied upon Section 2(a) of the McCarran-Ferguson Act, which declares: "The business of insurance shall . . . be subject to the laws of the several states which relate to the regulation or taxation of such business." The Court noted that the "unequivocal language of the Act suggests no exceptions,"[70] and pointed out that Congress had adopted the statute against the background of extensive *state* regulation of insurance:

> [I]n taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation [of insurance] . . . . [I]ts purpose was evidently to throw the whole weight of its power behind the state systems . . . .[71]

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[67] *Western & Southern Life Ins. Co.* v. *State Board of Equalization,* 451 U.S. 648 (1981) (*"Western & Southern Life"*) at 652-53 (emphasis added).

[68] 328 U.S. 408 (1946) (*"Prudential"*).

[69] *Western & Southern Life,* 451 U.S. at 653. *See also Prudential,* 328 U.S. at 430, 436.

[70] *Western & Southern Life,* 451 U.S. at 653.

[71] *Prudential,* 328 U.S. at 430. *See also Western & Southern Life,* 451 U.S. at 654.

In view of the broad authority granted to the states under the McCarran-Ferguson Act, this Court *rejected* the contention that the Commerce Clause prevented states from imposing "anti-competitive state taxation that discriminates against out-of-state insurers." The Court found "no such limitation in the language or history of the Act." [72]

Significantly, the decisions in *Western & Southern Life* and *Prudential* were *not* based upon a finding that the McCarran-Ferguson Act *specifically* authorized the states to impose *discriminatory* taxes upon out-of-state insurance companies. This Court instead found that Congress had *generally* authorized the states to regulate and tax the business of insurance. Accordingly, those decisions contradict Petitioners' claim that state regional banking laws must have been "specifically" contemplated by the Douglas Amendment.

B. Congress Has Granted to the States an Unqualified Power to Regulate Interstate Bank Acquisitions under the Douglas Amendment

Western & Southern Life and *Prudential* are directly applicable here. In a manner similar to the McCarran-Ferguson Act, the Douglas Amendment grants to the states an unqualified power to regulate interstate acquisitions of banks by bank holding companies, since any such acquisition is prohibited by *federal* law *unless* it is "specifically authorized by the statute laws of the State in which such bank is located." It would be difficult to conceive of a more

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[72] *Id.* at 653. *Prudential* upheld a South Carolina tax which applied *only* to *out-of-state* insurance companies, and *Western & Southern Life* sustained a California "retaliatory tax" which was assessed against insurance companies from *other* states which imposed taxes higher than those of California.

explicit and unconditional grant of authority by Congress to the states.[73]

Moreover, as in the case of the McCarran-Ferguson Act, there is no indication that Congress has limited the authority granted to the states under the Douglas Amendment. In *BT Investment,* this Court said that the Douglas Amendment grants to the states "authority to create exceptions . . . [which] *permit* expansion of banking across state lines where it otherwise would be federally prohibited."[74] This Court did not indicate any limitation on the authority of states to create such "exceptions." In fact, while the Court held that *Section 7* of the BHC Act authorizes the states to enact statutes only "within the boundaries marked by the Commerce Clause" (447 U.S. at 49), it stated *no* such view with respect to the *Douglas Amendment,* which is contained in *Section 3(d)* of the Act.

As shown above in Part I(B)(2), the legislative history of the Douglas Amendment confirms that Congress intended to provide the states with broad authority to determine the extent to which interstate bank acquisitions may occur. Senator Douglas stated that his Amendment would permit out-of-state holding companies to acquire banks in other states "*only to the degree that State laws*

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[73] In contrast, the cases relied upon by Petitioners involved federal statutes which did *not* contain any similar delegation of power to the states. In *Wunnicke,* 104 S. Ct. at 2240-43, the federal statutes in question dealt only with timber cut from *federal* lands and did *not* apply to *state* lands. In *New England Power Co.* v. *New Hampshire,* 455 U.S. 331 (1982) (*"New England Power"*), at 340-43, the federal statute contained only "a standard 'nonpre-emption' clause" which granted no additional authority to the states. Finally, each of the federal statutes involved in *Sporhase* v. *Nebraska,* 458 U.S. 941, 958-60 (1982), contained only a similar nonpreemption clause and a provision stating that water rights arising in connection with *federal* projects would be governed by state law. The latter provision was not relevant to the state reciprocity restriction on exportation of water which was at issue in *Sporhase.*

[74] 447 U.S. at 47 (emphasis in original).

expressly permit them." [75] Similarly, Senator Robertson, the chief sponsor of the BHC Act, acknowledged (while opposing the provision) that, under the Douglas Amendment, "no bank holding company in the future may cross a State line *unless the laws of the State involved permit it to so.*" [76]

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[75] 102 Cong. Rec. 6858 (1956) (emphasis added). Petitioners argue that Senator Douglas' remarks are unreliable "isolated fragments" of legislative history. Brief for Petitioner Citicorp at 27, and Brief for Petitioners Northeast and Union Trust at 26, *quoting New England Power*, 455 U.S. at 342.

New England Power, however, involved only the brief floor remarks of a *single* Congressman. In contrast, the Senate's discussion of the Douglas Amendment covers more than eight pages of the *Congressional Record* (102 Cong. Rec. 6760-61 and 6856-63), and every Senator who described the legal effect of the Douglas Amendment concurred with Senator Douglas' description. *See* 102 Cong. Rec. at 6760 (remarks of Senator Robertson), 6860 (remarks of Senator Bennett), 6861 (remarks of Senator Bricker), and 6862 (statement of Senator Payne). These extended and consistent statements cannot be dismissed as "isolated fragments" of legislative history.

Petitioners also quote *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), for the proposition that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Brief for Petitioner Citicorp at 27; Brief for Petitioners Northeast and Union Trust at 26 n.23. *Chrysler Corp.* explained that "[the sponsor's] statement must be considered with the Reports of both Houses and the statements of other Congressmen" (441 U.S. at 311). However, *unlike* the 1958 amendment to 5 U.S.C. § 301, which was considered in *Brown*, the Douglas Amendment was *not* included in a House or Senate committee bill (*see* Part I(B), *supra*), and there are no committee reports to consider in this case. Therefore, Senator Douglas' remarks are "an authoritative guide to the statute's construction," *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 526-27 (1982), and gain further significance in view of their consistency with the statements of other Senators who both supported *and* opposed the Douglas Amendment. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564-66 (1976); *Hilton* v. *Sullivan*, 334 U.S. 323, 338-39 (1948).

[76] 102 Cong. Rec. 6760 (1956) (emphasis added).

Senator Douglas pointed to the McFadden Act as the model for his Amendment.[77] As described above in Part I(A)(3), the McFadden Act authorizes national banks to establish branches " 'only to the extent that the State laws permit branch banking.' " *Walker Bank*, 385 U.S. at 261. Under the McFadden Act, the states may regulate the *method* by which national banks establish branches,[78] or may place *geographical limitations* on branching.[79] Senator Douglas noted that, in 1956, New York was divided by state branching law into ten geographic zones, and that state and national banks could not branch outside the zone where their home offices were located. 102 Cong. Rec. 6858 (1956). Thus, Senator Douglas' statement that his Amendment would embody "the principles of the McFadden Act" (*id.* at 6860) plainly indicates that the states may place *geographical and other limitations* on acquisitions of banks by out-of-state bank holding companies.

Senator Douglas' remarks strongly suggest that the states would have authority to be "selective" in admitting out-of-state bank holding companies.[80] In fact, certain Senators *opposed* the Douglas Amendment on the ground that it would mandate "discrimination" in interstate com-

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[77] 102 Cong. Rec. 6858, 6860 (1956).

[78] *E.g., Walker Bank*, 385 U.S. at 261-62 (state law permitting branching only by merger with an existing bank).

[79] *E.g., First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 94 96-99 (7th Cir. 1979) (state law prohibiting branching *except* in a city or town where no other bank is located); *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 539-41 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958) (state law prohibiting branching in a city or village in which another bank has its main office or a branch).

[80] *Iowa Independent Bankers*, 511 F.2d at 1296. *See* 102 Cong. Rec. at 6860, 6862 (remarks of Senators Douglas and Payne).

In *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613, 615 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1708 (1984), the District of Columbia Circuit reviewed its decision in *Iowa Independent Bankers* and reaffirmed its holding that "the Douglas Amendment empowered states *to discriminate among out-of-state bank holding companies* when deciding which could enter" (emphasis added).

merce.[81] Thus, Congress clearly understood that the Douglas Amendment would empower the states to regulate interstate bank acquisitions without regard to Commerce Clause limitations.[82]

C. Petitioners' Interpretation Is Contrary to the Intent of the Douglas Amendment.

In contrast to the broad state authority indicated by the terms and legislative history of the Douglas Amendment, Petitioners would severely restrict the ability of states to regulate interstate acquisitions of banks by bank holding companies. Petitioners argue that the Douglas Amendment does *not* make state laws enacted thereunder "immune from the Commerce Clause."[83] If this position were correct, it would create substantial doubt as to the validity of *all* of the state-enacted interstate banking laws discussed above in Part I(D), because *none* of those laws permits out-of-state holding companies to acquire in-state banks on the same basis as in-state holding companies.[84] Petitioner Citicorp seeks to distinguish state regional banking laws from other state laws which place reciprocal or functional restrictions on bank acquisitions by out-of-state holding companies,[85] but these latter statutes are *also* of doubtful validity if the Douglas Amendment does *not* protect them from scrutiny under the Commerce Clause.[86]

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[81] *See* notes 39-42, *supra*, and accompanying text.

[82] *See National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-61 (1974); *Hilton* v. *Sullivan*, 334 U.S. at 339.

[83] Brief for Citicorp at 21. *See also* Brief for Northeast and Union Trust at 22.

[84] *See BT Investment*, 447 U.S. at 36-37.

[85] Brief for Petitioner Citicorp at 37.

[86] *See* Brief for the Federal Respondent, *supra* note 7, at 13-14 n.18. *See also, e.g., Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976) (state law placing reciprocity condition on importation of out-of-

Petitioners' narrow interpretation of the Douglas Amendment is contrary to the broad construction adopted in *Iowa Independent Bankers,* where the District of Columbia Circuit said:

> [T]he intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy.[87]

Moreover, Petitioners' interpretation is contrary to the *general* federal policy in favor of *state* determination of banking structure.[88] As in the case of the insurance business, Congress has acted with "full knowledge" of the differing state systems for regulating banking structure, and has "throw[n] the whole weight of its power behind the state systems." *Prudential,* 328 U.S. at 430. Accordingly, state regional banking laws fall within the scope of authority conferred by Congress and do not violate the Commerce Clause.

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state milk violated Commerce Clause); *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949) (state order prohibiting establishment of in-state milk plant by out-of-state corporation, on ground that proposed plant would divert customers from existing in-state plants, was contrary to the Commerce Clauses).

[87] 511 F.2d at 1297. Similarly, in *Bank of New York,* 70 Fed. Res. Bull. at 528, the Federal Reserve Board pointed to "the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interestate banking".

[88] The only exception to this federal policy is 12 U.S.C. § 1823(f), which authorizes, under carefully defined circumstances, acquisitions of failed banks by out-of-state bank holding companies without state permission. *See* notes 48-49, *supra,* and accompanying text. The fact that Congress has created this *express* and *carefully limited* exception to state authority under the Douglas Amendment seriously undermines the effort of Petitioners to create an additional *implied* exception to state authority thereunder. *See Andrus* v. *Glover Construction Co.,* 446 U.S. 608, 616-17 (1980); Sutherland, *Statutes and Statutory Construction, supra* note 9, at § 47.11.

III. STATE REGIONAL BANKING LAWS DO NOT VIOLATE THE COMPACT CLAUSE

Petitioners contend that the challenged statutes constitute a "compact" which "inflicts substantial injury on all excluded states" and "impermissibly disrupts the balance of power between the states and the Federal Government" in the regulation of banking.[89] Because Congress has not specifically consented to these state laws, Petitioners claim that they violate the Compact Clause.

Petitioners' analysis is erroneous for several reasons. First, it does not appear that the challenged statutes represent a "compact." Despite Petitioners' arguments with respect to consultations among Connecticut and Massachusetts legislators,[90] the fact remains that each of the statutes was enacted *independently*. Unlike other cases in which the Court has found a "compact," the New England statutes do *not* embody a formal agreement between states,[91] or create powers which (i) may be exercised by an authority *separate* from each enacting state and (ii) are conditioned upon the acceptance of *other* states.[92]

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[89] Brief for Citicorp at 14. *See also* Brief for Petitioners Northeast and Union Trust at 33.

[90] Brief for Petitioner Citicorp at 5-6, 39-40; Brief for Petitioners Northeast and Union Trust at 32. Although the Federal Reserve Board said that the Connecticut and Massachusetts statutes "can be considered as part of an implicit compact or agreement," the Board did *not* rely upon any finding of an *actual* compact. *Bank of New England*, 70 Fed. Res. Bull. at 380, Pet. App. A52.

[91] *Compare, e.g., New Hampshire* v. *Maine*, 426 U.S. 363 (1976) (consent decree locating boundary line); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893) (agreement fixing boundary line).

[92] *Compare, e.g., United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (*"Multistate Tax Commission"*) at 491-93 (White, J., dissenting) (agreement creating multistate Commission which had power, *e.g.*, to conduct audits and issue subpoenas, and whose existence was conditioned upon the approval of at least *seven* states).

Second, even assuming *arguendo* that the challenged statutes are based upon an implicit agreement, this Court has held that reciprocal state laws do *not* create a "compact" requiring congressional consent *unless* they result in an "enhancement of state power at the expense of the federal supremacy".[93] As stated in *Multistate Tax Commission*, "the test [under the Compact Clause] is whether the Compact enhances state power *quoad* the National Government." 434 U.S. at 473.

In this case, there is no such "enhancement" of state power, because the challenged statutes do *not* authorize the states to exercise any powers *collectively* which each state could not exercise *separately* under the Douglas Amendment. *See id.* at 474-75.[94] As shown above, under the

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[93] *Multistate Tax Commission*, 434 U.S. at 469-71. *See also New York* v. *O'Neill*, 359 U.S. 1 (1959); *Bode* v. *Barrett*, 344 U.S. 583, 586 (1953).

[94] Petitioners argue that Congress' failure in 1984 to approve bills which would have specifically authorized state regional banking laws shows that Congress has not "consented" to such laws (*e.g.*, Brief for Citicorp at 7, 47). However, Petitioners' reliance on such legislative history is unavailing for two reasons. First, this Court's decision in *Multistate Tax Commission* was *not* affected by the fact that Congress had failed to pass any of *twelve* bills introduced to provide specific authorization for the challenged Commission. *See* 434 U.S. at 458 n.8, 486 (White, J., dissenting).

Second, in 1984 the Senate *did* pass a bill (S. 2851, 98th Cong., 2d Sess., § 903), by a vote of 89-5, which would have specifically authorized state regional banking laws. 130 Cong. Rec. S 11162, S 11178 (daily ed. Sept. 13, 1984). Significantly, Senator Garn, the chief sponsor and floor manager of the bill, stated that the provision was "merely a clarification of the powers that the states have always retained under the Douglas amendment," and was fully in accord with the interpretation of the Douglas Amendment by the Court below. *Id.* at S 11153; *see also id.* (remarks of Senator Tsongas). Thus, the only chamber of Congress which actually considered the issue in 1984 overwhelmingly *affirmed* the *existing* authority of states to enact regional banking laws. *Compare* 130 Cong. Rec. H 10005 (daily ed. Sept. 24, 1984) (remarks of Rep. St Germain concerning *absence* of House hearings or debates on regional banking and other provisions of Senate bill).

Douglas Amendment Congress has authorized *each state* to adopt legislation which permits out-of-state bank holding companies to acquire in-state banks subject to geographical and other limitations. In view of this congressional authorization, state regional banking laws do not encroach upon "federal supremacy" in violation of the Compact Clause.[95]

Finally, the challenged statutes do not injure non-New England states in any manner which violates the Compact Clause. This Court acknowledged in *Multistate Tax Commission* that regulatory actions by particular states may place "economic pressure" on other states, but nevertheless held:

> Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, . . . it is not clear how our federal structure is implicated.[96]

As shown above in Part II, state regional banking laws do *not* violate the Commerce Clause. In addition, corporations such as Petitioners are *not* protected by the Privileges and Immunities Clause.[97] Therefore, Petitioners have *not* demonstrated that the challenged statutes have any impact upon other states which is forbidden by the Compact Clause.

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[95] *See Multistate Tax Commission*, 434 U.S. at 471-72. Despite Petitioners' claim that there is a "vital federal interest" in interstate banking (*e.g.*, Brief for Citicorp at 45), this Court has held that a "federal interest" is *not* sufficient to implicate the Compact Clause. Only a collective state encroachment upon "federal *supremacy*" will violate the Compact Clause. *Id.* at 479-80 n.33 (emphasis added). Moreover, both the Court below and the Federal Reserve Board concluded that the Douglas Amendment represents a "*renunciation of federal interest* in regulating the interstate acquisition of banks by bank holding companies." 740 F.2d at 207 (Pet. App. A29), *quoting Bank of New England*, 70 Fed. Res. Bull. at 380 (Pet. App. A52) (emphasis added).

[96] *Multistate Tax Commission*, 434 U.S. at 478 (citation omitted).

[97] *Western & Southern Life*, 451 U.S. at 656.

CONCLUSION

For the reasons set forth above, *amicus curiae* Conference of State Bank Supervisors respectfully requests that this Court affirm the decision below.

Respectfully submitted,

ERWIN N. GRISWOLD*
JAMES F. BELL
ARTHUR E. WILMARTH, JR.

JONES, DAY, REAVIS & POGUE
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939

**Counsel of Record*

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No. 84-563

In the Supreme Court of the United States

October Term, 1984

Northeast Bancorp, Inc., Et Al.

Petitioners

v.

The Board of Governors of
The Federal Reserve System

Respondent

and

Bank of New England Corporation, CBT Corporation, Hartford National Corporation, The Commonwealth of Massachusetts, The State of Connecticut, and Bank of Boston Corporation

Intervenor-Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER

Joseph I. Lieberman
Attorney General

Elliot F. Gerson
Deputy Attorney General

John G. Haines*
Assistant Attorney General

Jane D. Comerford
Assistant Attorney General

P.O. Box 120
Hartford, Connecticut 06101

*Counsel of Record [illegible]

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QUESTIONS PRESENTED

1. Whether the provisions of the Connecticut Interstate Banking Act, which allow Connecticut banks to be acquired by similar institutions in the other New England states which grant reciprocal rights to Connecticut banks, are authorized by the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §1841 *et seq.* and thus do not violate the Commerce Clause?

2. Whether the reciprocal provisions of the Connecticut and Massachusetts Interstate Banking Acts constitute an interstate agreement increasing the power of the states in a manner which interferes with federal supremacy in violation of the Compact Clause?

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC., ET AL.

Petitioners

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM

Respondent

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT, AND BANK OF BOSTON CORPORATION

Intervenor-Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER

STATEMENT OF THE CASE

In June of 1983 the Connecticut General Assembly passed the Connecticut Interstate Banking Act ("the CIBA"),[1] which, *inter alia*, allows Connecticut banks to be acquired by financial institutions located in the other New England states, provided they have adopted reciprocal legislation granting the same rights to Connecticut institutions.

[1]Conn. Pub. Act 83-411, the relevant portions of which have been codified as Conn. Gen. Stat. §36-552 and §36-553, reproduced at Pet. App. A-97 to A-100.

The primary intent of the CIBA was to lift the federal prohibition against interstate acquisitions of banks in accordance with a provision of the Bank Holding Company Act ("the BHCA"), 12 U.S.C. §1841 *et seq.*, which specifically defers to state law on this issue.[2]

The BHCA, which provides for federal regulation of the creation and operation of bank holding companies, requires that any acquisition of control of a bank by a corporation or partnership must be approved by the Federal Reserve Board. Section 3(d) of the BHCA, commonly known as the "Douglas Amendment," precludes the Federal Reserve Board from approving any application by which a bank holding company proposes to acquire an interest in a bank located in another state as follows:

> [N]o application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act) shall be approved . . . which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, . . . *unless the acquisition of such shares*

[2]It should be noted that the BHCA only applies to banks and bank holding companies. For purposes of the BHCA, the term "bank" is very narrowly defined as any institution which accepts demand deposits *and* makes commercial loans. 12 U.S.C. §1841(c). The Connecticut Act goes beyond the scope of the Douglas Amendment by including savings banks and savings and loan associations, which are subject to other regulatory schemes. This should not be an issue here, however, because all of the mergers and acquisitions challenged by the Petitioners are subject to the BHCA.

> *or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication . . . .*

12 U.S.C. §1842(d) (emphasis added).

The Douglas Amendment thus establishes a general bar under federal law to the acquisition of a local bank by an out-of-state bank holding company but permits a state to enact specific legislation lifting this bar.

In enacting the CIBA, the Connecticut General Assembly did not read the Douglas Amendment's authorization of state action as providing a choice between no interstate banking (by leaving the federal bar in place) or unlimited interstate banking. In order to assess the benefits and detriments of interstate banking, the Connecticut General Assembly chose to authorize an experiment in interstate banking and to limit the scope of the experiment to the New England states which adopt reciprocal laws.

The other New England states, however, have taken somewhat diverse postures toward interstate banking. Maine allows virtually unlimited interstate banking.[3] New Hampshire and Vermont have taken no action, and the Douglas Amendment continues to prohibit any interstate acquisitions in those states. Rhode Island permits acquisition of its banks by institutions located in New England states with reciprocal laws until June 30, 1986, and thereafter on a nationwide reciprocal basis.[4] The Massachusetts Act, like Connecticut's, is limited to New England states with reciprocal laws.[5]

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[3]Me. Pub. Law 1983, ch. 302, §2, as amended (1984).

[4]R.I. Gen. Laws §19-30-1, 19-30-2.

[5]Mass. Gen. L. Ann. ch. 167A §2.

The present matter[6] arises out of three agreements between Connecticut and Massachusetts bank holding companies. Pursuant to the BHCA and the state acts, the Federal Reserve Board ("the Board") approved applications by Bank of New England Corp., a Massachusetts bank holding company, to acquire CBT Corp., a Connecticut bank holding company; Hartford National Corp., a Connecticut bank holding company, to acquire Arltru Bancorporation, a Massachusetts bank holding company; and Bank of Boston Corp., a Massachusetts bank holding company, to acquire Colonial Bancorp, a Connecticut bank holding company.

In the proceedings before the Board, Petitioners, Northeast Bancorp, a Connecticut bank holding company, and its subsidiary Connecticut bank, the Union Trust Company (collectively "Northeast"), and Citicorp, a New York bank holding company, opposed these transactions claiming *inter alia* that the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses of the Constitution. The Federal Reserve Board rejected these claims finding that "there is no clear and unequivocal basis for a determination that the CIBA is inconsistent with the Commerce Clause, Compact Clause or Equal Protection Clause of the United States Constitution." *Bank of New England Corporation,* 70 Fed. Res. Bull. 374, 377 (1984). (Pet. App. A-41). The same finding was made with

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[6]A related matter pending before this Court is a Petition for Writ of Certiorari in the case of *Citicorp v. Board of Governors of the Federal Reserve System,* _____ F.2d _____ (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3406 (U.S. Nov. 8, 1984) (No. 84-754). Citicorp is seeking a review of the judgments of the Second Circuit entered on October 10, 1984 and November 5, 1984, which affirmed orders of the Board of Governors approving the acquisition by Bank of Boston Corporation, a Massachusetts bank holding company, of RIHT Financial Corporation, a Rhode Island bank holding company, and the acquisition by Fleet Financial Group, Inc., a Rhode Island bank holding company, of Fleet National Bank of Boston, a Massachusetts bank, and Fleet National Bank of Connecticut, a Connecticut bank. *See* 70 Fed. Res. Bull. 737 (1984) (Bank of Boston Corporation); 70 Fed. Res. Bull. 834 (1984) (Fleet Financial Group).

regard to the Massachusetts Act. 70 Fed. Res. Bull. 353, 354 (1984).)Pet. App. A-72 to A-78).

Northeast and Citicorp appealed the Federal Reserve Board's rulings to the Second Circuit, again claiming that the Board's orders approving these transactions were unlawful because the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses of the Constitution. The Court of Appeals found both arguments without substance.

With regard to the Commerce Clause, the Court of Appeals held that the Connecticut and Massachusetts Acts were authorized by Congress in the Douglas Amendment. As to the Compact Clause, the Court held that, even if the Connecticut and Massachusetts Acts were treated as a compact, they would not violate the Compact Clause because under the test stated by this Court in *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 471 (1978), there is no "combination tending to increase the political power in the states, which may encroach upon or interfere with the just supremacy of the United States." Accordingly, the Court affirmed the orders of the Federal Reserve Board.

SUMMARY OF ARGUMENT

1. The provisions of the Connecticut Interstate Banking Act (Conn. Pub. Act 83-411, §§2, 3) which permit Connecticut banks and bank holding companies to be acquired by similar institutions in the other New England states with reciprocal laws do not violate the Commerce Clause. The CIBA is authorized by the Douglas Amendment to the Bank of Holding Company Act, 12 U.S.C. §1842(d), which prohibits the Federal Reserve Board from approving any application by a bank holding company to acquire a bank in another state unless specifically authorized by the laws of that state. The Douglas Amendment is an affirmative statement of federal policy which allows each state to determine the conditions under which out-of-state bank holding companies may enter and acquire banks within its borders.

2. Under this Court's test, the reciprocal provisions of the Connecticut and Massachusetts Interstate Banking Acts do not violate the Compact Clause because there is no interstate compact or agreement which tends to increase the power of the compacting states in a manner which interferes with federal supremacy. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978); *Virginia v. Tennessee*, 148 U.S. 503 (1893). There is no overt agreement between Connecticut and Massachusetts; the state Acts provide no interstate apparatus for the regulation of bank holding companies; the state Acts do not impair the sovereign rights of non-New England states; there is no conflict between the state Acts and any regulatory scheme of the federal government in the area of bank expansion; and there can be no interference with federal supremacy because the Douglas Amendment defers to state law on the issue of interstate banking.

ARGUMENT

I

THE CONNECTICUT INTERSTATE BANKING ACT DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT WAS AUTHORIZED BY CONGRESS IN THE DOUGLAS AMENDMENT TO THE BANK HOLDING COMPANY ACT.

A. STATUTORY BACKGROUND: FROM McFADDEN AND DOUGLAS TO THE CONNECTICUT ACT

The Commerce Clause issue in this case cannot be fairly understood without some discussion of the structure of American banking. That structure is, to say the least, unique both in relation to banking in other countries and in relation to other major industries in this country.

To a large extent, the present controversy turns on the construction of the Douglas Amendment. That provision, however, is merely one piece of the statutory structure of American banking and should not be viewed in isolation. The following discussion is intended to place the Douglas Amendment in context and to provide a frame of reference for the issues in this case.

1. *The Balkanization of American Banking: The McFadden Act and the Douglas Amendment*

The most striking feature of American banking is its fragmented structure. Any discussion of that structure must begin with the "dual banking system" which permits institutions to be chartered by either the states or the federal government. However, the state and federal systems are not totally separate. Over the years, the two have been tied together by a

complex network of federal regulation on the state system and various deferrals to state law in the federal system. The second point of fragmentation is the division of financial institutions along product lines (i.e., commercial banks and thrift institutions), although these lines are becoming increasingly blurred. The final point of fragmentation is geographic. Unique among American industries, banks have been prevented from expanding across state lines and, in many states, bank operations are limited to a single community. Glidden, *Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System?*, 1980 U. Ill. L.F. 369 [hereinafter cited as "Glidden"]; Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1 (1977)[hereinafter cited as "Scott"]; Gorinson and Manishin, *Gain-St. Germain: A Harbinger of Change*, 40 Wash. & Lee L. Rev. 1313 (1983); *Geographic Restrictions on Commercial Banking in the United States, The Report of the President*, Dept. of the Treasury, January 1981 [hereinafter cited as "The Report of the President"].[7]

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[7]In commenting on the geographic restrictions on American banking, one expert has stated:

> [W]hat is so unusual about banking is that it, and it alone among major industries, is restricted by state lines so that each institution's operations are limited to the area of only one of the 50 separate states. Certainly a foreigner must wonder what unusual statutory circumstances allows an automobile company or a distributor of groceries or petroleum products, or, to come closer to home, a securities firm or a finance company, to open an office in any state it desires so long as it conforms to the various licensing or other provisions that might apply, but forbids a commercial bank from doing so. Many Americans, including some who are not even aware of the limitation, must wonder about the same question. If any of these other companies were ever denied the right to enter other states there would be an immediate resort to constitutional protections against barriers to inter-

The unusual statutory circumstances which led to the balkanization of American banking into fifty separate banking zones are the result of choices made by Congress to defer to the states on the issue of geographic expansion by banks.

The first expression of this federal policy is contained in the McFadden Act, adopted in 1927 and amended in 1933 (12 U.S.C. §36), which limits national banks to the same branching powers as are expressly permitted to state banks under state law.[8] The result of the McFadden Act is that banks chartered by the federal government are not allowed to operate nationally. They are locked in the same geographic compartments as their state chartered counterparts and only allowed to expand through branching in accordance with state policy. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, *reh'g denied*, 385 U.S. 1032 (1966). Pursuant to the McFadden Act, the states have adopted a wide variety of branching statutes deemed suitable for each state ranging

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state commerce and the like. But this is not the case for commercial banking.

Golembe, Memorandum re: Interstate Banking, Golembe Reports Vol. 1978-6, at 4.

[8]12 U.S.C. §36(c):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . . .

from statewide branching to a complete prohibition of branching. Glidden, *supra*, at 374. The federal policy of allowing state control of bank expansion through branching has remained essentially intact since the 1933 amendment to the McFadden Act. *Id.* at 380.

The second major piece of federal legislation which confined bank expansion to the borders of the states is the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d).

The bank holding company movement was primarily a response to restrictive state branching laws (as grafted onto the federal system by the McFadden Act) which limited bank expansion. Glidden, *supra*, at 380. By the time Congress addressed the bank holding company movement in any comprehensive fashion, several bank holding companies were already operating large interstate networks.[9] The response to this phenomenon, the Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.*, presented another forum to debate and determine the structure of American banking. Should interstate expansion be allowed and, if so, should it be subject to federal control, or state dominance as embodied in the McFadden Act?[10]

The House Committee on Banking and Currency, which opposed bank holding companies as a threat to local unit banks[11] reported out a bill which would have prohibited interstate acquisitions entirely and tied bank holding company expansion to the McFadden scheme of branch banking.[12]

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[9]*See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 3-4 (1955).

[10]*See* Glidden, *supra* at 371-73 (citing Scott, *supra*).

[11]*See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 2, 5 (1955); J. App. A-5 to A-7.

[12]H.R. No. 609, 84th Cong., 1st Sess. 3, 15 (1955).

The Senate disagreed with this position. Its bill did not tie bank holding company expansion to the McFadden Act framework for branch banking, and it would have permitted interstate acquisitions.[13]

In presenting the Senate bill, however, the floor manager, Senator Robertson, emphasized that Section 7 of the proposed legislation would not preempt the states from imposing greater restrictions on bank holding companies and that this adequately protected the states' interests. In making his statement, Senator Robertson quoted with approval a Georgia law which prohibited bank holding companies from owning over 15 percent of the voting stock of two or more banks in the state. 102 Cong. Rec. 6752-53 (1956). Senator Robertson thus envisioned that the states could impose conditions on the expansion of bank holding companies. It was also clear that the Senate contemplated that a state could prohibit entry by out-of-state bank holding companies. *Id.* at 6855.[14]

Predictably, the outcome of the debate over interstate acquisitions was compromise. Between the House bill and its absolute prohibition on interstate acquisitions and the Senate bill which would permit such acquisitions subject to state power to limit or prohibit entry came Senator Douglas and his amendment.

The terms of the Douglas Amendment, which were accepted by both houses of Congress, are quite clear and, in spite of subsequent events, have not been materially altered. The Federal Reserve may not allow a bank holding company to acquire an interest in a bank

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[13]S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955).

[14]Section 7 of the BHCA, 12 U.S.C. §1846, is a "savings clause," intended to preserve existing state regulations of bank holding companies even if more restrictive than federal law. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 48-49 (1979).

> located outside the state in which the operations of such bank holding company's subsidiaries were principally conducted on July 1, 1966 . . . *unless [such acquisition] is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.*

12 U.S.C. §1842(d) (emphasis added).

Thus, unlike the original Senate bill which allowed interstate acquisitions subject to state power to block them pursuant to Section 7 of the Act, the Douglas Amendment placed a general bar to such acquisitions but allowed the states to lift it.

In urging the adoption of his amendment, Senator Douglas stated:

> [O]ur amendment will permit out of state holding companies to acquire banks in other states only to the degree that state law expressly permits them . . . .

102 Cong. Rec. 6858 (1955).

In remarking on his amendment, Senator Douglas also stated:

> [I]t is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

> Anyone who favors States rights, it seems to me should support my amendment. I am not urging it on that ground, however. I believe in a somewhat unified banking system. However, so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so.
>
> My good friend the Senator from Virginia [Mr. Robertson] yesterday, in his speech presenting the bill, criticized my amendment on the ground that, by making further interstate expansion more difficult, it would freeze the present situation and would aid monopoly.
>
> In the first place, it does not freeze the situation, as the analysis of the powers left to the Board makes clear. It is still possible to have an expansion of a bank holding company within its home State, if it musters the approval of the Federal Reserve Board. Moreover, if State law permits, and if approved by the Board, interstate acquisitions are possible. Therefore the amendment does not freeze the situation.

Id. at 6860.

It is therefore clear that Senator Douglas contemplated that a state might lift the federal bar on interstate acquisitions and that the purpose of the Amendment was to support *state prerogatives* along the lines expressed in the McFadden Act. Thus, it does not seem reasonable to conclude that Senator Douglas or Congress intended to limit the powers of the states by confining them to the choice of no interstate banking or unlimited entry by out-of-state bank holding companies. This

view is fully supported by the history of the bill to which the Amendment was offered. Senator Robertson clearly stated that the original bill allowed the states to place conditions on or prohibit entirely acquisitions by out-of-state bank holding companies. Further, it does not seem reasonable to conclude that the Douglas Amendment which "favors states rights" should be read as granting the states no greater powers than are contained in Section 7 of the BHCA.

Just as the McFadden Act produced a variety of branching laws, the Douglas Amendment has spawned a wide range of interstate banking laws. As noted in the staff analysis attached to the Board's order allowing the BNE/CBT merger, a number of these statutes discriminate against out-of-state bank holding companies and "result in some burdens on interstate commerce." 70 Fed. Res. Bull. at 386 (1984), Pet. App. A-71.[15] In approving applications under these statutes,

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[15] Delaware (Del. Cod. Ann., Title 5, §803), Maryland (Md. Fin. Inst. Code Ann. §5-901), Virginia (Va. Code §6.1-390 to 6.1-397) and Nebraska (Neb. Rev. Stat. §§8-905, 8-906 (Supp. 1983)) have permitted out-of-state bank holding companies to acquire local banks under certain conditions, including limitations on activities, number of offices and home office location, which are not imposed on in-state bank holding companies. One of the major purposes of such legislation is to gain employment for local residents and tax revenues for the state without seriously affecting competing local banking businesses; the statutes accomplish this by permitting out-of-state bank holding companies to export their credit card operations to states with less restrictive usury laws. Similarly, South Dakota (S.D. Codified Laws Ann. §§51-16-40 to 51-16-44, Supp. 1984) has recently permitted the entry of out-of-state bank holding companies on a limited basis to acquire a state bank with a broad range of insurance powers.

70 Fed. Res. Bull. at 386, Pet. App. A-70.

We would add that these statutes not only discriminate against interstate commerce but also discriminate against other states. The activities of

both the Board and the various states appear to have interpreted the Douglas Amendment as allowing the states to discriminate against out-of-state bank holding companies which desire to acquire or establish *a bank* within the state. [16]

Congress has the power, as it always had, to create a single order out of this diversity. Indeed, under the International Banking Act of 1978, 12 U.S.C. §611 *et seq.*, Congress required the President to report on the applicability of the McFadden Act to today's financial environment. The result was the Report of the President—Geographic Restrictions on Commercial Banking in the United States (1981).

Although the language mandating the Report refers only to the McFadden Act, President Carter broadened the study to include the Douglas Amendment. The Report discusses the history of these provisions and the nature of the existing market. In this regard, it notes that even with the McFadden Act and the Douglas Amendment, substantial interstate activity already exists, particularly on the wholesale side (i.e., large corporations and wealthy individuals frequently effect transactions with banks across state lines) and in the nationwide activities of money funds, finance companies, and non-bank subsidiaries of bank holding companies. *See also Lewis v. BT Investment Managers Inc.*, 447 U.S. 27 (1979).

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banks authorized by these statutes are intended only for export to other states. In this regard the Delaware statute is typical. It provides that a bank owned by an out-of-state bank holding company may only be "operated in a manner and at a location that is not likely to attract customers from the general public *in this state* to the substantial detriment of banking institutions located in this state . . . ." Del. Code Ann. Title 5 §803(5). (Emphasis added).

[16]The considerations are quite different where an out-of-state bank holding company proposes to acquire or establish an allowable *nonbanking* subsidiary in a state. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1979).

The Report concluded with, *inter alia*, the following recommendations:

> 1. *The Administration has concluded that the McFadden Act, as amended, and Section 3(d) of the Bank Holding Company Act are increasingly ineffective, inequitable, inefficient, and anachronistic, and that the existing de facto system of interstate banking should be ratified and further liberalized through a phased relaxation of current geographic restraints. Since government shaped the financial world that presently exists, government is obliged to create conditions which will permit an orderly evolution to a new financial environment. Liberalization of geographic limitations should be accomplished in stages to avoid shortrun instability and should be designed to foster a competitive and relatively unconcentrated system of financial intermediaries.*

The Report of the President, *supra*, at 17 (emphasis in original).

After discussing the relative merits of various approaches to the problem, the Report concluded:

> In view of these considerations, the Administration recommends that over the short term the Congress enact a phased liberalization of the Douglas Amendment. To accommodate the concerns of banks which have relied upon the existing framework, this deregulation might be accomplished in stages. For example, Congress could consider initially restricting interstate acquisitions by imposing limits on the markets

> that might be entered—*e.g., interstate acquisitions might be limited to a regional basis.* Alternatively, or in addition, Congress might impose limits on the banks to be acquired—*e.g.*, a bank eligible for acquisition by an out-of-state BHC could not hold more than a specified percentage of local market share.

The Report of the President, *supra*, at 17-18 (emphasis added).

While Congress failed to act on this report, its conclusions found a more receptive audience in Connecticut, where they could be implemented by accepting Congress' longstanding invitation in the Douglas Amendment.

2. *The Connecticut Act*

In 1979, the Connecticut General Assembly appointed a special six member commission ("the Hebb Commission") to study and report on the desirability of legislation to limit the extent to which bank holding companies (both local and out of state) may maintain an office or conduct business in Connecticut through a subsidiary. "In addition," the General Assembly stated, "the Commission shall consider such other factors as are pertinent . . . including . . . policies with respect to the interstate conduct of banking business." Conn. Pub. Act 79-563, §1, Conn. Gen. Stat. §36-5b. In the same Public Act the General Assembly placed a one year moratorium (subsequently extended to July 1, 1983) on the extension of non-banking activities of bank holding companies in the state while the Hebb Commission conducted its study (*see* Conn. Pub. Act 79-563 §2, 80-126 §2, 82-95 §1 and 82-97 §2). Meanwhile, the Hebb Commission's mandate was extended (Conn. Pub. Act 80-126 §1) and then expanded to include *inter alia* "interstate banking's relationship with and impact on

intra state banking" as well as mergers and consolidations of financial institutions. Conn. Pub. Act 82-97 (amending Conn. Gen. Stat. §36-5b).

In accordance with the General Assembly's directive, the Hebb Commission issued its findings and recommendations on January 5, 1983.[17] In its findings the Report sketched the background against which its recommendations were made, including federal deregulation and the emergence in the financial services industry of such organizations as Sears, Merrill Lynch, Shearson/American Express and others. The Commission then stated that it believed "that the interest of both consumers and businesses in Connecticut would be well served by increasing the number of competitors and the vigor of banking competition in the state." Ct. App. J.A. 1239. But, the Commission observed: "To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and business would not, we believe, serve our state well. Similarly, to expose our small banks to the rigors of unlimited competition from large out-of-state banking organizations . . . would not be wise." Ct. App. J.A. 1240-41.

In balancing these conflicting considerations, the Commission recommended an "experiment"[18] in interstate banking. The Commission stated that by an experiment,

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[17]Report to the General Assembly of the State of Connecticut of the Findings and Recommendations of the Commission to Study Legislation to Limit the Conduct of Business in Connecticut by Subsidiaries of Bank Holding Companies and the Impact of the Non-Depository Institutions on Traditional Banking Activities.
Court of Appeals (Ct. App.) J.A. Vol. IV at 1230-44.

[18]*See New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting): "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

> we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking.

Ct. App. J.A. 1241.

In defining the limits of this experiment, the Commission continued to use a geographic framework like the Douglas Amendment but expanded its scope to include all of the New England states. In making this recommendation, the Commission stated:

> We believe that there is a natural economic and cultural community of interest among the New England states that would make such an experiment in regional banking a reasonable first step toward interstate banking. We further believe that the legislature would be justified in excluding New York from this first phase on the ground that New York is the home state of a number of the nation's very largest banking institutions and that it is necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking before exposing our banking system to the full rigor of competition from these giant institutions.

Ct. App. J.A. 1242.

The terms of this experiment, which are the subject of Petitioners' challenge, were hotly debated but were ultimately passed by a wide margin in both houses of the Connecticut General Assembly.

B. THE DOUGLAS AMENDMENT IS AN AFFIRMATIVE STATEMENT OF FEDERAL POLICY WHICH ALLOWS THE STATES TO DETERMINE THE CONDITIONS UNDER WHICH OUT-OF-STATE BANK HOLDING COMPANIES MAY ENTER AND ACQUIRE BANKS IN EACH STATE

It is axiomatic that the Commerce Clause vests in Congress plenary powers to regulate commerce among the states. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652 (1981); *Lewis v. BT Investment Managers Inc.*, 447 U.S. 27, 35 (1979); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1945); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). It is also axiomatic that in the exercise of that power Congress has the authority to impose restrictions on interstate commerce. *Prudential Insurance Co. v. Benjamin*, 328 U.S. at 408; *United States v. Darby*, 312 U.S. 100 (1941); *Champion v. Ames*, 188 U.S. 321 (1903). Indeed, as the Court stated in *Prudential Insurance Co. v. Benjamin*, 328 U.S. at 434:

> The power of Congress over commerce . . . is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade.

The geographic restrictions imposed by the McFadden Act and the Douglas Amendment are examples of the exercise of that power.

It is equally well established that Congress may exercise its plenary power over commerce "indirectly by conferring upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Investment Managers Inc.*, 447 U.S. at 44. Again, the Douglas

Amendment is an example of the exercise of this power. While it generally prohibited interstate acquisitions, it left to each state the decision whether and to what extent to allow out-of-state bank holding companies to acquire banks within its borders.

We are thus not dealing with a situation where Congress has been silent, and the dormant Commerce Clause with its implied limitation on state power is not an issue.[19] Congress affirmatively indicated its approval of state action in the Douglas Amendment, and as this Court reiterated only recently:

> If Congress ordains that the states may freely regulate an aspect of interstate commerce, any action taken by a state within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.

Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. at 652-53.

In this regard the seminal case of *Prudential Insurance Company v. Benjamin, supra,* is particularly relevant. In that case the plaintiff claimed that a tax imposed on the operations of foreign insurance companies in South Carolina, where no similar tax was required of South Carolina corporations, discriminated against interstate commerce and in favor of local business. The case was brought in the wake of the Court's decision in *United States v. Southeastern Underwriters,* 322 U.S. 533 (1944), holding that insurance was commerce subject to federal regulation. South Carolina relied on the McCarran

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[19]Indeed, the Hebb Commission Report appears to base its recommendations entirely on the proposition that Congress had authorized such state action in the Douglas Amendment. *See* Ct. App. J.A. 1238.

Act, in which Congress had responded to the *Southeastern Underwriters* decision by providing:

> [T]he Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . . 59 Stat. 33, 34; 15 U.S.C. §1011-1015.

(As cited in *Prudential Insurance Co. v. Benjamin*, 328 U.S. at 429).

In opposing South Carolina's tax, Prudential claimed that by passing the McCarran Act, "Congress neither intended to, nor could, validate such taxes." *Id.* at 419. The Supreme Court disagreed both as to the basic power of Congress "to give support to the existing and future state systems for regulating and taxing the business of insurance," *id.* at 429, and as to the intention of Congress to do so. On the basis of the McCarran Act, the Court upheld the tax.

The logic of *Prudential v. Benjamin* applies here. Congress' deferral to state law on the face of the Douglas Amendment is unequivocal. Congress clearly intended to sanction "future state systems" of regulation such as the Connecticut Act. Any decision to the contrary would render the words a nullity. It is also clear from the history of the Douglas Amendment that Congress intended to leave to the individual states the determination, on the basis of local needs, whether, and on what conditions, out-of-state bank holding companies should be allowed to enter. The root purpose of the Douglas Amendment was the protection of the local bank and local supplies of credit to serve the local economy. It was left to the states to determine how this could best be accomplished.

This view is fully supported by the long history of federal deference to state law governing expansion by banks and every case which has considered the scope of the states' authority under the Douglas Amendment.

In *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), the plaintiff, an association of Iowa bankers, appealed from a decision of the Federal Reserve Board approving the acquisition of two Iowa banks by a Minnesota bank holding company under a state law which permitted the acquisition of Iowa banks by any out-of-state bank holding company that already owned at least two banks in the state. The Iowa Act was plainly designed to serve Northwest Bancorporation, the only out-of-state bank holding company that could qualify.

The Association's appeal was based, *inter alia*, on the claim that the Iowa statute was invalid because it conflicted with the intent of Congress expressed in the Douglas Amendment.

Like the petitioners here, the Association claimed that

> implicit in the Douglas Amendment is a prohibition against discrimination between out-of-state bank holding companies. In other words, . . . the states can only decide whether to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely.

511 F.2d at 1296.

Before reaching this issue, the Court had already decided that, based on the local situation, there was a rational basis for the action of the Iowa legislature. Then, after reviewing the Douglas Amendment and its history, the D.C. Circuit rejected the plaintiff's claim that the Douglas Amendment was intended to impose limitations on the power of the states. On the contrary, the Court held that

> the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy. Petitioner's suggested interpretation of [the Douglas Amendment] would rob the states of this power.

Id. at 1297.

The clear import of the *Iowa Bankers* case is that a state may partially lift the bar of the Douglas Amendment and impose conditions and limitations on the entry of out-of-state bank holding companies to serve local needs. The D.C. Circuit recently reaffirmed this view in *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1708 (1984). The Court

below also appears to have had no difficulty in reaching the same conclusion.

The legislative history of the Connecticut Act shows that its purpose was to strike a balance between the protection of local supplies of credit and the anti-competitive effects of the geographic restrictions imposed by the Douglas Amendment, in light of the realities of today's economy. In striking this balance, the Hebb Commission recommended a regional approach to interstate banking as a reasonable first step, and this proposal was ultimately incorporated in the CIBA. While the CIBA may well be said not to accord with the spirit of the dormant Commerce Clause, that "our economic unit is the Nation," *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 537 (1945), Congress clearly has the ability to discriminate in favor of local trade and just as clearly did so in the Douglas Amendment.

The Petitioners claim, however, that Congress did not authorize the states to lift the bar of the Douglas Amendment in any way that would discriminate against out-of-state institutions or unduly burden interstate commerce in bank mergers and acquisitions. We are told that not only must such authorization be "expressly" stated in federal law, *New England Power Company v. New Hampshire*, 455 U.S. 331, 340-41 (1982), *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *South-Central Timber Development Inc. v. Wunicki*, ____ U.S. ____, 104 S.Ct. 2237 (1984), but also that such expression must precisely describe the particular state action Congress intends to authorize.

Our response may be brief. First, the Petitioners' argument that the geographic criteria used in the CIBA could not have been authorized by Congress because the debate on the Douglas Amendment does not mention any particular method of lifting its state line geographic restrictions is totally without

merit. As this Court's decisions make clear, Congress may sanction "future state systems" of regulation, *Prudential Insurance Co. v. Benjamin*, 328 U.S. at 429, and any such future state system which is "within the *scope* of the Congressional authorization" is rendered invulnerable to Commerce Clause challenge. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 652-53 (emphasis added).[20]

Second, the Douglas Amendment is distinctly different from the situations presented in *South-Central Timber Development Inc. v. Wunicki, supra, Sporhase v. Nebraska, supra,* and *New England Power Company v. New Hampshire, supra,* where the Court could not find any express authorization for state action. Indeed, because of the nature of the industry, the history of state dominance in the area of bank expansion and the broad language of the Act, the Douglas Amendment more nearly resembles the McCarran Act, *supra.*

The Petitioners' attempt to read the negative implications of the Commerce Clause (and its implied hostility to state economic protectionism) into the Douglas Amendment is similarly unavailing. The Douglas Amendment—a federal Act—totally blocks the interstate acquisition of banks by bank holding companies. If there is one proposition on which no one can disagree, it is that the Douglas Amendment was not passed to facilitate the free flow of commerce. There is also no indication in the Douglas Amendment (or the McFadden Act) that uniformity of regulation among the states is required in the national interest. Indeed, the intent of Congress appears to have been quite the opposite. The result is our balkanized banking system.

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[20]Although the issue arose in a different context, in *White v. Massachusetts Council of Construction Employers*, _____ U.S. _____, 103 S.Ct. 1042, 1047 (1983), far from requiring specific *Congressional* authorization, the Court relied on federal *regulations* to exempt the challenged action from the restrictions of the Commerce Clause.

In short, *Congress* restricted the flow of interstate commerce. But it gave the states the power to remove the obstruction—to further state policies—not because of any national interest in the free flow of commerce. In light of the severe geographic restrictions on bank holding company expansion imposed by Congress, it is difficult to see how it can be claimed at all that the Connecticut Act "burdens" interstate commerce. Absent action by a state, there is no such commerce. Indeed, as the Court below observed:

> [I]n permitting interstate acquisitions (albeit limited to New England) the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it.

740 F.2d at 208.

The Commerce Clause, and more particularly the dormant Commerce Clause, "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). While the Connecticut Act may not benefit the petitioners, it cannot seriously be claimed that the CIBA harms an interstate market which cannot even exist absent state action.

Reliance on *Lewis v. BT Investment Managers Inc., supra,* is also misplaced. The Court was not there dealing with the acquisition of a bank by an out-of-state bank holding company subject to Section 3(d) of the BHCA (the Douglas Amendment). That case dealt with a non-bank, investment advisor subsidiary of a bank holding company subject to Section 4 of the BHCA (12 U.S.C. §1843), which imposes no geographic restraints. *See* Glidden, *supra,* at 382. Indeed, the Court held

that the Douglas Amendment did not even apply. Yet we are directed to a few lines of dicta where the Court observed:

> The only authority granted to the states [in the Douglas Amendment] is the authority to create exceptions to [the Douglas Amendment] general prohibition . . . .

447 U.S. at 47. But this is precisely what Connecticut had done here—create an exception to the general prohibition.

In sum, the provisions of the Connecticut Act which allow entry by out-of-state bank holding companies but which condition such entry on the geographic origin of the acquiring institution and the grant of reciprocal rights to Connecticut institutions are authorized by the Douglas Amendment. Those provisions do not intrude on the national power to regulate commerce among the states granted to Congress in the Commerce Clause, or any national interest in the free flow of commerce.

II

THE CONNECTICUT ACT IS NOT AN INTERSTATE AGREEMENT WHICH VIOLATES THE COMPACT CLAUSE

The Compact Clause, which provides that "[n]o state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .," is violated only where there is an interstate compact or agreement, which tends to increase the power of the compacting states in a manner which interferes with federal supremacy. *United States Steel Corp. v. Multistate Tax Commission,* 424 U.S. 452 (1978); *Virginia v. Tennessee,* 148 U.S. 503 (1893).

In addressing this issue, we note first that the passage of reciprocal legislation in Connecticut and Massachusetts did not occur pursuant to any explicit or tacit legislative or executive agreement. Rather, it constituted the independent act of each state. The enactment of such reciprocal legislation does not automatically create a "compact." *See New York v. O'Neill*, 359 U.S. 1, 9 (1959); *Bode v. Barrett*, 344 U.S. 583, 586 (1953).

While the Petitioners make much of the fact that a Massachusetts legislator, Senator Brennan, convoked a meeting of bankers, regulators, and legislators from the New England states to consider regional interstate banking in New England (Citicorp Brief at 5), it does not appear from the record that this meeting was officially sponsored by either Connecticut or Massachusetts. Further, the fact that Senator Brennan testified before a committee of the Connecticut General Assembly is not evidence of an interstate compact. Moreover, as indicated by the legislative history of the CIBA and the 1981 Report of the President discussed *supra* page 16), the concept of regional interstate banking has existed for some time and did not stem from any agreement between Connecticut and Massachusetts as implied by the Petitioners. Finally, the fact that Connecticut, like New York before it (*see* N. Y. Banking Law §142-b (McKinney Supp. 1983)), adopted a reciprocal interstate banking law is not proof of an interstate agreement. As shown from the legislative history of the Connecticut Act, its purpose was to benefit Connecticut by increasing competition—but mindful of the possible adverse consequences to small banks, unlimited interstate banking would have to await an evaluation of the experiment authorized by the Connecticut General Assembly. The fact that this experiment incidently confers a benefit on banks in such other New England states which adopt reciprocal laws—and does not confer a similar benefit on banks in other states—is not evidence of an agreement between states.

Second, even if a compact could be said to exist, it fails the second prong of the test in *United States Steel.* There is no increase in the power of the compacting states in any manner which interferes with federal supremacy.

No independent commission or other administrative body is authorized by the Connecticut Act. The Act does not create any interstate apparatus for the administration of bank holding companies, nor does it commit any state to approve any particular acquisition.[21] In this regard it should be noted that the Connecticut Act merely lifts the bar of the Douglas Amendment. Other state laws set forth the criteria under which individual mergers or acquisitions will be considered.[22] Each state separately administers its own law, retaining discretion to apply its own independent standards. The Connecticut and Massachusetts Acts simply reflect the exercise of each state's sovereign power. Neither separately nor as a group have the New England states created power in excess of that which flows from their individual enactments. Thus, like the multistate arrangement in *United States Steel,* the Connecticut and Massachusetts Acts are neither intended to, nor have the purpose of, enhancing the political power of the "compacting" states.

Nevertheless, Petitioners, purporting to rely on *United States Steel,* contend that in some unspecified manner the Connecticut Act impairs the sovereign rights of non-New England states so as to disrupt the federal system. It should be noted, however, that absent the lifting of the bar of the

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[21]In *United States Steel* some 21 states adopted legislation which established an independent commission composed of tax administrators for the purpose of creating an interstate apparatus for the administration of the taxation of multistate businesses. Thus, the Connecticut Act would be far less intrusive of federal supremacy than the arrangement upheld in *United States Steel,* 434 U.S. at 472-73.

[22]*See, e.g.,* Conn. Gen. Stat. §§36-30, 36-92, 36-93, 36-140.

Douglas Amendment, Petitioners would still be prohibited from expanding across state lines. Thus, it cannot be said that the reciprocal Acts "redowned" to the harm of, or impair the interests of, other states. Indeed, Petitioners have failed to specify exactly and concretely how the Connecticut Act harms other states. Their argument is, in effect, an equal protection claim that all states must be treated equally. However, the Compact Clause contains no requirement that all states be accorded equal treatment. Further, the risk of any potential harmful effects are "independent of the Compact," since the individual states could have imposed identical effects without entering into an agreement. *United States Steel*, 434 U.S. at 473, 478. Secondly, while Petitioners claim that " 'Congress is the proper body to evaluate the extent of the harm being imposed on non-compact states, and to impose ameliorative restrictions as might be necessary,' "[23] Congress has not found it necessary to impose such restrictions.

Finally, the Connecticut Act does not interfere with federal supremacy. As a matter of federal policy, Congress has unequivocally deferred to the states—in the Douglas Amendment and in other federal acts—on the issue of bank expansion within the borders of the states. Further, although Congress allowed the states to lift the limitation on interstate acquisitions of banks by bank holding companies, the Federal Reserve Board maintains full power and authority to pass upon all such acquisitions permitted by state laws. State laws cannot operate so as to permit holding companies to make acquisitions in a manner that would be inconsistent with federal standards. Thus, federal supremacy relating to the expansion of bank holding companies remains fully protected and the exercise by the states of the power given to them would not constitute an unwarranted intrusion on that supre-

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[23]Citicorp Brief at 43 (quoting *United States Steel*, 434 U.S. at 496 (White, J., dissenting)).

macy. The Connecticut and Massachusetts Acts do not require Congressional approval under the Compact Clause because "they neither project a new presence onto the federal system nor alter a state's basic sphere of authority." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Power Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976).[24]

Nevertheless, Petitioners claim a potential for direct conflict between the CIBA and the failing bank provision, 12 U.S.C. §1823(f), added by the Garn-St. Germain Depository Institutions Act of 1982.[25] Such a claim ignores the express terms of that federal statute. Specifically, 12 U.S.C. §1823(f) provides that in certain circumstances the FDIC may permit the acquisition of a failing local bank by an out-of-state bank holding company. Before approving such transaction, however, the FDIC must consult with the local bank supervisor in the state of the failing bank and give the supervisor 48 hours to object to the use of the failing bank provision. If the state supervisor objects, the FDIC may use the provision only upon

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[24]Petitioners appear to confuse potential impact on "federal interests" with threats to "federal supremacy." *See* Citicorp Brief at 45; Northeast Brief at 37 n.32. *See also* Brief for the State of New York, as *Amicus Curiae*, at 11. That there is a federal interest no one denies. However,

> "[a]bsent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval."

United States Steel, 434 U.S. at 479, n.33.

[25]*See* Citicorp Brief at 46; brief for the State of New York, as *Amicus Curiae*, at 11.

the unanimous vote of its Board of Directors. 12 U.S.C. §1823(f)(3)(c). Thus, the failing bank provision ameliorates any prospect for conflict between federal and state laws.[26] If such a hypothetical conflict did occur, however, the Supremacy Clause would make the federal determination controlling. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982). Thus, it cannot be said the Connecticut Act interferes, or is in any way inconsistent, with any regulatory scheme of the federal government in the area of bank expansion.

In short, Petitioners' Compact Clause argument is, in effect, nothing more than a rehash of their Commerce Clause claim. In this regard, the *United States Steel* Court, in rejecting the argument that by creating economic pressure on non-member states to join the multistate arrangement, the compact was an affront to federal sovereignty of sister states, held that even though such pressure was created,

> [u]nless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, §2, it is not clear how our federal structure is implicated.

434 U.S. at 478.

As previously discussed, *see* section I *supra*, the Connecticut Act does not transgress the bounds of the Commerce Clause and therefore does not violate the Compact Clause.

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[26]If the Garn-St. Germain Depository Institutions Act has any relevance to this case, it is to once again demonstrate the extreme deference of federal authorities to state control of bank expansion. Even where a bank is failing, Congress required the FDIC, the federal insurer, to look first to in-state institutions as a merger partner and required consultation with the state supervisor. *See* 12 U.S.C. §1823(f).

In sum, because the Connecticut Act is not part of an interstate compact and, further, because it in no way enhances state political powers or encroaches on federal supremacy, the Act does not violate the Compact Clause.

CONCLUSION

For the reasons set forth above, the Respondent, State of Connecticut, respectfully asserts that the decision of the Court of Appeals should be upheld.

Respectfully submitted,

STATE OF CONNECTICUT
AND BRIAN J. WOOLF,
ITS BANKING COMMISSIONER

JOSEPH I. LIEBERMAN
Attorney General

ELLIOT F. GERSON
Deputy Attorney General

JOHN G. HAINES*
Assistant Attorney General

JANE D. COMERFORD
Assistant Attorney General

P.O. Box 120
Hartford, Connecticut 06101
Tel. (203) 566-4899

**Counsel of record*

No. 84-363

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

LAURENCE H. TRIBE
Counsel of Record
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
Counsel for Intervenor-Respondent Bank of New England Corporation

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Counsel for Intervenor-Respondent Hartford National Corporation

MARK A. WEISS
STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Intervenor-Respondent Bank of Boston Corporation

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Questions Presented

1. When Congress has "balkanized" banking by barring interstate bank acquisitions while expressly authorizing states to make exceptions by specific legislation, does a state law exercising this authority offend the negative implications of the dormant Commerce Clause if it lifts the congressional barrier only within its own geographical region, where nothing in Congress' authorizing language requires a state's action thereunder to disregard an acquiring company's state of origin and where Congress, when enacting its barrier and authorizing states to lift it without qualification, was fully aware that there was support for a regional approach?

2. Does the Compact Clause require after-the-fact congressional approval of parallel state laws that, at most, coordinate their respective states' exercises of Congress' express grant of authority, where those state laws create no new governmental entity, mount no challenge to federal supremacy, alter no state's sovereign powers, place no burdens on any state beyond those imposed by Congress itself, and create no effects distinct from those that the same states could create without any cooperation or agreement with one another?

Parties To The Proceeding

The caption of the case in this Court lists all parties to the proceeding. Bank of New England Corporation, CBT Corporation and Hartford National Corporation each have no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1. The listing required for Bank of Boston Corporation by Rule 28.1 appears in Appendix A to the Brief Of Respondent Bank Of Boston Corporation In Opposition To Petition, with the following additions:

Advent Capital Limited (United Kingdom)

CombiNet

Linguaphone Holdings PLC (United Kingdom)

Pearce Technology Limited (United Kingdom)

South East Asia Venture Investment Company, N.V. (Singapore)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

Intervenor-Respondents Bank of New England Corporation ("BNE"), CBT Corporation ("CBT"), Hartford National Corporation ("HNC") and Bank of Boston Corporation ("BBC") (collectively the "private respondents") submit this brief in opposition to the constitutional challenges of peti-

tioners Northeast Bancorp Inc., Union Trust Company (collectively, "Northeast") and Citicorp to the Orders of the Board of Governors of the Federal Reserve System (the "Board") approving the applications of BNE to merge with CBT, HNC to acquire Arltru Bancorporation, and BBC to acquire Colonial Bancorp, Inc. (the "Orders"), affirmed by the United States Court of Appeals for the Second Circuit.

Statement of the Case

To reverse the decision below, this Court would have to embrace the wholly novel conclusion that states exceed their constitutional and statutory authority when—pursuant to express congressional authorization—they partially lift a federally-imposed barrier to interstate commerce.

It is undisputed that, in the Douglas Amendment to the Bank Holding Company Act of 1956,[1] Congress placed a logjam in the stream of interstate commerce by prohibiting bank holding companies from acquiring banks located in other states. Nor is it disputed that Congress simultaneously and explicitly empowered the states to lift this barrier by enacting statutes specifically authorizing such interstate acquisitions of in-state banks. And it is further undisputed that the particular bank acquisitions challenged here are, as the Douglas Amendment requires, "specifically authorized by the statute laws" of Massachusetts and Connecticut.

Petitioners build their entire case upon one feature of those statutes: the fact that each removes the congressionally-erected barrier only with respect to New England states which offer reciprocal acquisition privileges to Massachusettes or Connecticut institutions. Unable to find violations of the Commerce and Compact Clauses in what these states have *done*, petitioners seek to establish violations in what the two states have chosen *not* to do. The purported violations consist of the allegedly collective and conspiratorial *omissions* of Connecticut and Massachusetts to lift the federal barrier to interstate bank acquisitions with respect to states outside New England.

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1 12 U.S.C. § 1842(d) ("Section 3(d)" or the "Douglas Amendment").

Petitioners thus ask this Court to discern constitutional violations in the states' failure to adhere to a "norm of national economic unity" that was emphatically rejected by Congress in the Douglas Amendment itself.

A. The Bank Holding Company Act And Its Historical Antecedents.

The American banking system, which today encompasses some 42,000 depository institutions (including nearly 15,000 commercial banks), has long been distinctive for its decentralized structure and its strong emphasis on local control of banking and credit.[2] Our decentralized, fragmented banking system is a reflection of the belief—deeply engrained in American consciousness since the early Nineteenth Century—that control over credit should remain diffused and that the public interest is best served by locally-controlled, community-oriented financial institutions.[3]

This Court itself has recognized that, "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern."[4] The development and preservation of locally-based banking institutions have, since at least the Jacksonian era, been deemed important to ensure that the credit and service requirements of local businesses and consumers are properly considered and met.[5]

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2 *See Geographic Restrictions on Commercial Banking—the Report of the President*, Dep't of the Treasury, 1 (January 1981) ("*Geographic Restrictions on Commercial Banking*"). Financial power in other major Western nations is concentrated in the hands of a few large centralized banking institutions. In England, for example, commercial banking is dominated by the so-called "Big Five." In Canada, the entire nation is served by only 11 commercial banks. R. Syron, *The "New England Experiment" in Interstate Banking*, New England Ec. Rev. 5, 6 (March/April 1984) ("*Syron*") (*reproduced in* Joint Appendix in the Second Circuit—"JA (2d Cir.)"—2411.

3 *Geographic Restrictions on Commercial Banking* at 1.

4 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

5 *See, e.g.*, B. Hammond, *Banks and Politics in America* 326-29, 335-36 (1957); M. Madeline, *Monetary and Banking Theories of Jacksonian Democracy* 11 (1943).

Both the states and the federal government have taken steps to foster local control of banking institutions. At one time, many states wholly prohibited the operation of branches by their own state-chartered banks,[6] and even today a number of states maintain geographic limitations on bank branching[7]. Meanwhile, Congress in the McFadden Act, as amended in 1933, precluded all *interstate* branching by national banks and authorized *intrastate* branching by such banks only to the extent that state-chartered banks in the same state are permitted to branch.[8] Congress thus ensured that a national bank charter could not be used to avoid state branching restrictions, thereby leaving—as this Court previously has recognized—"the desirability of branch banking up to the States."[9]

The McFadden Act ultimately proved insufficient to contain the ambitions of aggressive bankers who resorted to the holding company device as a means of avoiding the federal prohibition on interstate branching. Through holding company structures, a number of major banking organizations acquired banks located outside their home states, establishing extensive interstate networks.[10] Congress viewed this development as a grave threat to the traditional American system of locally-controlled banking institutions oriented towards serving the needs of their communities.[11]

As a result, in the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"), Congress addressed

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6 *E.g.*, 68 Cong. Rec. 2833 (1926) (statement of Rep. Goldsborough); *id.* at 3232-33 (statement of Rep. Williamson).

7 *E.g.*, Ill. Const. Art. 13, § A (Smith-Hurd 1971); Minn. Stat. Ann. § 48.34 (West Supp. 1984).

8 12 U.S.C. § 36(c). See n.31.

9 *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966).

10 *E.g.*, 102 Cong. Rec. 6858 (1956) (remarks of Sen. Douglas) (describing interstate expansion of various bank holding companies).

11 *E.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2 (1955) (*substantial excerpts reproduced in* Joint Appendix—"Jt. App."—A5-A7); 102 Cong. Rec. 6857-60 (1956) (*substantial excerpts reproduced in* Jt. App. A10-A16) (remarks of Sen. Douglas); 102 Cong. Rec. 8228-29 (1955) (remarks of Rep. Patman).

the subject of bank acquisitions[12] by bank holding companies[13] in general and *interstate* bank acquisitions in particular. In Section 3 of the BHC Act, Congress provided that a bank holding company may not acquire a bank without prior Federal Reserve Board approval.[14] In Section 3(d) of the BHC Act—the so-called Douglas Amendment—Congress expressly prohibited the Board from approving a bank holding company's acquisition of a bank located outside the holding company's home state *unless* such an acquisition is "specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication."[15] Congress, as this Court has observed, thus established a "general *federal* prohibition" of interstate bank acquisitions and empowered the states—in the words of Senator Paul Douglas, the amendment's principal sponsor—to *create exceptions* to this federal ban[16] "to the degree" that they wished.[17] Congress thereby sought to stem the flow of out-of-state bank holding companies across the states' borders—a phenomenon that threatened the tradition of community-oriented banking—and to enable the states to control future entry by out-of-state banking organizations. The revolution in interstate nonbank financial services that has occurred in the years since the Douglas Amendment was enacted[18] has, if anything, increased the importance of Congress' original de-

12 As used in the BHC Act, a "bank" is an institution organized under federal or state law which accepts deposits that the depositor has a legal right to withdraw on demand, and also engages in the business of making commercial loans. 12 U.S.C. § 1841(c).

13 A "bank holding company" is a company that has or acquires control over one or more banks. 12 U.S.C. § 1841(a)(1).

14 12 U.S.C. § 1842(a).

15 12 U.S.C. § 1842(d).

16 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis added).

17 102 Cong. Rec. 6858 (*reproduced in* Jt. App. A13).

18 *See, e.g.*, Ginsburg, *Interstate Banking*, 9 Hofstra L.Rev. 1133, 1175-76, 1185-1219 (1981).

sign that the states have the power to control interstate bank acquisitions.[19]

B. The Actions Of Massachusetts, Connecticut And The Other New England States Under The Douglas Amendment.

The Massachusetts Act was passed in December, 1982.[20] It authorizes out-of-state bank holding companies based in the other five New England States to acquire Massachusetts banking organizations, provided that the acquiror's home state accords reciprocal acquisition privileges to Massachusetts institutions. In June 1983, Connecticut passed a similar statute,[21] culminating five years of consideration of interstate banking.[22]

Prior to passage of the Acts, neither Massachusetts nor Connecticut had exercised the authority conferred by the Douglas Amendment. *All* acquisitions of Massachusetts and Connecticut banks by out-of-state bank holding companies were prohibited by the Douglas Amendment. The challenged statutes thus *permit* interstate commerce between Connecticut and Massachusetts, and potentially among as many as six New England states, where previously such commerce had been prohibited by federal law.

None of the other New England states deals with interstate bank acquisitions as do Massachusetts and Connecticut. Rhode Island has enacted a similar statute whose regional feature expires on June 30, 1986: Rhode Island will then permit acquisition of its banks by any out-of-state bank holding company whose home state (like New York) accords reciprocal privileges to Rhode Island banking institutions.[23] Maine's stat-

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19 See pp. 33-35, 38-39, *infra*.

20 Mass. Ann. Laws ch. 167A § 2 (West Supp. 1982) (the "Massachusetts Act") (Appendices To Petition For Writ Of Certiorari—"Pet. App." —A101-A102).

21 1983 Conn. Acts, Pub. Act No. 83-411 (Reg. Sess.) (the "Connecticut Act") (Pet. App. A99).

22 See pp. 35-37, *infra*.

23 R.I. Gen. Laws §§ 19-30-1, 19-30-2.

ute permits entry by out-of-state bank holding companies throughout the nation even if their home states do not accord reciprocity to Maine banks.[24] Vermont and New Hampshire have not enacted interstate bank acquisition statutes; in those states, the Douglas Amendment continues to prohibit acquisitions by *all* out-of-state bank holding companies.[25]

C. Proceedings Below.

After passage of the Massachusetts and Connecticut Acts, Massachusetts-based BNE agreed to merge with CBT, a Connecticut bank holding company; HNC, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, a Massachusetts bank holding company; and BBC of Massachusetts agreed to acquire Connecticut-based Colonial Bancorp, Inc. Applications for approval of these transactions were submitted, as required by law, to the Federal Reserve Board.

Over petitioners' objections that the Acts violated the Commerce and Compact Clauses of the Constitution,[26] the Board approved the transactions. It concluded that the Connecticut and Massachusetts Acts provide the specific state statutory authorization required by the Douglas Amendment (Pet. App. A37, A74, A83) and that there is no adequate basis to declare the Acts unconstitutional (Pet. App. A38-A41, A49-A71, A74-A75, A83). In rejecting petitioners' Commerce Clause claims, the Board concluded: "[n]othing in the history of the . . . Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry" (Pet. App. A71). The Board thus adhered to its longstanding interpretation that the Douglas Amendment authorized the states

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24 Me. Pub. Law 1983, ch. 302, § 2, as amended (1984) (*further* discussed at n.69).

25 See n. 85.

26 U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); art. I, § 10, cl. 3 (Compact Clause).

to permit interstate bank acquisitions on a selective basis. *Id.*[27]

The Board did *not* find that the New England states had entered into any actual agreement or confederation (Pet. App. A51-A52). It recognized that, even if the Acts were to be considered part of an "implicit" compact or agreement, they would violate the Compact Clause only if they "enhance[d] state powers *at the expense of federal supremacy*" (Pet. App. A52) (emphasis added). Because the Douglas Amendment reflects a congressional decision to allow the states to determine which, if any, interstate bank acquisitions are to be permitted within their borders (Pet. App. A52), the Board rejected petitioners' Compact Clause challenges.

On appeal, the Second Circuit affirmed the Orders, noting that the Acts promote, rather than restrict, interstate commerce (Pet. App. A29). Recognizing that the Douglas Amendment departed profoundly from the notion of a single national economic unit, the Court of Appeals held that, "if Congress authorizes the states to regulate some aspect of interstate commerce"—as Congress has clearly done in the Douglas Amendment—"any action taken by a state within that authority is 'invulnerable' to challenge" (Pet. App. A30) (*quoting Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-53 (1981)).[28] As to the Compact Clause, the Court of Appeals concluded that, even if the Acts were "treated as a compact," there is no threat of encroachment upon "the just supremacy of the United States" that would violate the Compact Clause (Pet. App. A31-A32). In this regard, the Second Circuit deferred to the Board's conclusion that the Douglas Amendment constitutes "a 'renunciation of federal interest in regulating interstate acquisi-

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27 See n.77.

28 The Second Circuit found no support for petitioners' claims that Congress had intended to restrict the states' authority to lift part way the general federal prohibition on interstate bank acquisitions imposed by the Douglas Amendment (Pet. App. A28-A29).

tions of banks by bank holding companies' " (Pet. App. A29).[29]

Summary of Argument

The gravamen of petitioners' constitutional attacks on the Connecticut and Massachusetts Acts is that the legislatures of those states, in not giving wholesale approval to all interstate bank acquisitions, and in experimenting instead with regional freedom of acquisition, unconstitutionally discriminated between New England bank holding companies and those located in other states. Petitioners contend that, when one state fails to override in full a federal exclusion from its borders of companies based in the other states, such *in*action violates the Commerce Clause; and that, when two states make parallel and reciprocal omissions of this sort without express congressional approval of the combined result, there is *collective* inaction that violates both the Commerce and Compact Clauses.

Petitioners rely on a form of "dormant Commerce Clause" analysis that is manifestly inappropriate in this novel context. Congress, by the Douglas Amendment and other banking legislation, has dramatically departed from the national "common market" that petitioners champion. The Douglas Amendment by its literal terms prohibits all interstate bank acquisitions unless the states enact exceptions to the federal prohibition. Connecticut and Massachusetts have availed themselves of this opportunity to experiment with a regional approach to such bank acquisitions.

Viewed against this background of congressionally-imposed obstruction of interstate commerce and discrimination against

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29 Petitioners' argument that the Second Circuit deferred to a constitutional adjudication of which the Board itself professed doubts (Brief of Citicorp, "CitiBr.", at 9-10; Brief of Northeast, "NEBr.", at 9) misreads the Second Circuit's opinion. That opinion establishes that the court below gave substantial deference not to any constitutional judgment, but rather to the Board's longstanding and plainly reasonable interpretation of a provision of federal banking law—the Douglas Amendment. (Pet. App. A29) (*quoting Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979 (1984)).

out-of-state corporations, the challenged statutes represent an *expansion* of interstate commerce. Additional congressional authorization for the states' omission to lift the federal barrier more broadly and uniformly is unnecessary. This Court's precedents precluding casual inference of congressional authorization for discriminatory or obstructive state legislation are inapposite, since Congress has gone beyond mere abdication of the field and has *itself*—in petitioners' phrase—"balkanized" bank acquisitions along state lines. Since Congress "awakened" the Commerce Clause by emphatically rejecting the norm of national unity in the Douglas Amendment—opting instead to empower the states to control interstate bank acquisitions—the negative implications of the dormant Commerce Clause no longer apply.

Thus, there simply is no basis for concern in this case as to whether Congress has "authorized" states to *leave in place*, by their complete or partial inaction, any "discriminatory" *federal* exclusions that flow from a statutory ban that Congress has itself enacted. And, in any event, the results achieved by the combination of the Douglas Amendment with what Massachusetts and Connecticut have both done—and omitted to do—fall well within the range of what Congress contemplated.

Nor is the Compact Clause in any way implicated, for the challenged statutes neither constitute nor reflect an interstate compact requiring express congressional approval. In independently enacting their admittedly parallel statutes, Connecticut and Massachusetts have created no new entity within the federal system. And the regional approach to banking made possible by the two challenged statutes engenders no threat to federal supremacy, for Congress itself partitioned the nation into myriad isolated bank acquisition zones when it passed the Douglas Amendment. Since they partially ameliorate this federally-imposed fragmentation, the Acts are actually steps toward national unification that Congress expressly authorized the states to pursue.

Petitioners' Compact Clause challenge ultimately depends upon a showing that the New England states have *agreed* to the regional limitations contained in their respective Acts. Even assuming *arguendo* that some of those states have "agreed" to

open their borders to each other's bank holding companies, there is no basis whatsoever for inferring any agreement among such states to exclude the bank holding companies of other states. None of the New England statutes requires, as a condition to reciprocity, that other states' statutes include *any* regional limitation. To the extent that non-New England bank holding companies may be barred from acquiring Connecticut or Massachusetts banks, that exclusionary effect derives from the Douglas Amendment. At the very most, the purported exclusion is attributable to *unilateral* actions of the individual states, and not to any agreement that implicates the Compact Clause—petitioners' penchant for "conspiracy" theories notwithstanding.

Argument

I. CONGRESS "BALKANIZED" THE NATION'S BANKING SYSTEM BY A FEDERAL BAN THAT IT EXPRESSLY AUTHORIZED THE STATES TO LIFT.

Petitioners contend that the Douglas Amendment does not manifest Congress' intent to displace dormant Commerce Clause norms in the area of interstate bank acquisitions. Petitioners thereby ask this Court to ignore that Congress, in the Douglas Amendment and other statutes, has effected a geographic fragmentation of banking that is the very antithesis of the dormant Commerce Clause. Petitioners would also have this Court ignore that Congress, as the legislative history of the Douglas Amendment makes clear, empowered the states to lift the pre-existing federal barrier to interstate bank acquisitions in order to preserve states' rights: Congress left the states free to calibrate the permissibility of interstate acquisitions of their banks "to the degree" that the states desired.

A. Having Determined That A Geographically Fragmented Banking System Best Serves The National Interest, Congress Erected A Federal Barrier To Interstate Banking.

In the Douglas Amendment, Congress—as this Court previously has stated—established "a general *federal* prohibition on the acquisition or expansion of *banking* subsidiaries across

state lines" by bank holding companies.[30] Prior to the enactment of the Douglas Amendment, Congress had undertaken through the McFadden Act and related legislation to prohibit branch banking on an interstate basis.[31] These branching restrictions proved inadequate to contain interstate expansion through the holding company mechanism.[32] In an effort to preserve the long-established American preference for a locally-controlled and community-oriented banking system, Congress enacted the Douglas Amendment.[33]

By the Douglas Amendment and the McFadden Act, Congress has intentionally compartmentalized the nation's banking structure into separate units along state lines, unambiguously establishing that, in banking, local control and community orientation shall take priority over unrestrained interstate commerce, and that economic units far smaller than the entire nation shall be the norm.[34] Indeed, Congress' intent to dictate

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30 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis added).

31 In addition to prohibiting interstate branching by national banks in the McFadden Act (see p. 4, *supra*), Congress in the Federal Reserve Act (12 U.S.C. § 321) applied the McFadden Act's branching restrictions to state-chartered banks that are Federal Reserve System members. Similarly, the National Bank Act provides that national banks may consolidate only with other banks located within the same state. 12 U.S.C. §§ 214-215a.

32 See p. 4, *supra*.

33 As Senator Douglas explained, the "immediate practical effect" of his Amendment was "to bar the expansion of bank holding companies across State lines." 102 Cong. Rec. 6860 (*reproduced in* Jt. App. A15); *accord id.* at 6859 (*reproduced in* Jt. App. A15).

34 *See Geographic Restrictions on Commercial Banking* at 1 (noting that the Douglas Amendment and the McFadden Act reflect a congressional determination to balkanize the American banking system on a geographic basis along state lines).

Congress' decision to do so, of course, is not subject to Commerce Clause challenge. The Commerce Clause vests Congress with plenary power to regulate interstate commerce in any manner not inconsistent with other specific constitutional provisions. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The only prohibition of state legislation in the Commerce Clause derives from its negative implications. As construed by this Court, the

the geographic fragmentation of banking along state lines could not be more clear. A state that desires the exclusion of out-of-state bank holding companies need take *no* action; Congress itself has imposed such exclusion.[35] Thus, in the Douglas Amendment, Congress did not merely abandon the field to the states; it stood the dormant Commerce Clause on its head, by *affirmatively imposing* economic balkanization.

This extraordinary displacement of dormant Commerce Clause norms did not go unrecognized when Congress considered the Douglas Amendment. Opponents attacked the amendment on the very ground that it imposed "discrimination" against out-of-state bank holding companies as a matter of federal law unless the states acted affirmatively to relieve that "discrimination." During the floor debate, Senator Bennett criticized the amendment because it

> makes a blanket prohibition which can only be lifted by specific affirmative action by the States. . . .
>
> The net effect of the amendment is to require every State that does not now have legislation prohibiting bank holding companies to discriminate in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the discrimination.

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so-called dormant Commerce Clause reflects an implicit judgment that, *in the absence of congressional action*, interstate commerce should be free from state-imposed inhibitions and discrimination. *E.g.*, *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-71 (1976). When Congress chooses to act, however, it is not bound by the negative implications of the Commerce Clause. *E.g.*, *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946). This Court has repeatedly upheld federal statutes which prohibit interstate commerce where Congress has determined that such a prohibition is in the national interest. *E.g.*, *United States* v. *Darby*, 312 U.S. 100 (1941) (excluding from interstate commerce goods manufactured in plants whose employees' wages and hours did not meet federal standards); *Hipolite Egg Co.* v. *United States*, 220 U.S. 45 (1911) (upholding ban on interstate transportation of impure food); *Champion* v. *Ames*, 188 U.S. 321 (1903) (upholding legislation banning interstate transportation of lottery tickets).

35 Conversely, if a state wishes to permit entry, it must act affirmatively to relieve the congressionally-imposed discrimination against interstate commerce. See pp. 27-29, *infra*.

> So far as I can learn, no State has of its own volition, and by action of its own legislature, set up such discrimination. . . .
>
> [T]he effect of this amendment . . . [would be] to require discrimination in interstate commerce, and then leave it to the several States to correct it. . . .

102 Cong. Rec. 6860 (*reproduced in* Jt. App. A16-A17); *accord* 102 Cong. Rec. 6861 (1956) (remarks of Sen. Bricker).

In enacting the Douglas Amendment over these objections, Congress was well aware that, by imposing a complete barrier to an important form of interstate commerce, it was departing in the most extreme manner from the dormant Commerce Clause norm of a single national economic unit. Indeed, the legislative history of the BHC Act confirms that Congress imposed this unique scheme because it deemed the suppression of interstate commerce in bank acquisitions essential to the preservation of local control over banking.

The House of Representatives had passed a version of the BHC Act in 1955 in which it sought to preserve smaller, locally-responsive and community-oriented banks.[36] Many Representatives were concerned about "preserv[ing] our free enterprise banking system" of geographically dispersed banks, which they perceived as "a vital factor in the development of

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36 In the debate which preceded the House's passage of this bill, this was a crucial point:

> It is hard to believe that a branch of a gigantic corporation, with its headquarters many miles away will have the sympathetic understanding of the needs of a community as does the local bank which is so definitely a part of the community life.

101 Cong. Rec. A 2454 (1955) (remarks of Rep. Wier).

> [W]hat this bill is designed to attack, and to rectify, is the situation under which decent American citizens far removed from your town and my town, completely unfamiliar with the economies of our communities and not a bit interested except for the dividends that can be siphoned out of them can control our banks and the source of credit in our communities; they have the power—if they have the resources—to make decisions affecting the life blood of our local economies.

Id. at 8030 (remarks of Rep. Rains).

the United States."[37] The use of the holding company device to circumvent branch banking restrictions "threatened to destroy" that "democratic grass roots institution"—the smaller, community-oriented bank—and "thereby to facilitate concentration of credit facilities" which "would have a revolutionary effect upon the free enterprise system"; the House's version of the BHC Act therefore included an absolute prohibition of interstate bank acquisitions.[38]

Although he proposed a different approach to interstate bank acquisitions, Senator Douglas shared the concerns expressed in the House.[39] The Senator described his amendment as being "in the true American tradition" of "prevent[ing] undue concentration of banking and financial power, and instead keep[ing] the private control of credit diffused as much as possible."[40] Senator Douglas, noting with alarm a trend

37 H.R. Rep. No. 609, 84th Cong., 1st Sess., 2-6 (1955) (*substantial excerpts reproduced in* Jt. App. A5-A7). The House Report went on to describe the operations of the nation's decentralized banking system as follows:

> Like yeast cells in a loaf of bread, each working in its immediate area, our banks scattered throughout the country have cooperated to produce the greatest and most general economic development the world has known.

Id. at 6 (*reproduced in* Jt. App. A7).

38 *Id.* at 1-2, 5-7 (*substantial excerpts reproduced in* Jt. App. A5-A6); *accord* 101 Cong. Rec. 4407 (remarks of Rep. Wier), 3823 (speech of Rep. Rayburn submitted for the Record by Rep. Spence), 8028-29 (remarks of Rep. Patman), 8030-31 (remarks of Rep. Rains), 8033 (remarks of Rep. O'Hara), 8034 (remarks of Rep. Marshall) (1955).

39 102 Cong. Rec. 6860 (*reproduced in relevant part in* Jt. App. A15-A16). Senator Douglas' remarks on the Senate floor include the observation that credit was becoming concentrated through the use of the bank holding company device "to get around restrictions on branch banking." *Id.* at 6858 (*reproduced in* Jt. App. A14). His remarks also include a lengthy review of the expansion of large bank holding companies across state lines, a development he viewed with great concern. *Id.* (*reproduced in* Jt. App. A14-A15).

40 *Id.* at 6857 (*reproduced in* Jt. App. A10). Senator Douglas went on to note:

> For we know that when the credit resources of a country become concentrated and fall into a few hands, then the industry and trade of

toward concentration in American banking fueled by a number of "big mergers,"[41] declared that the previously unfettered interstate expansion of bank holding companies had to be checked in order to preserve smaller, community-oriented banks from competition with, and acquisition by, the large money center bank holding companies.[42]

B. In Deference To State Autonomy, Congress Expressly Authorized The States To Lift The Federal Barrier Selectively.

In adopting the Douglas Amendment, Congress, acting in deference to the Senate's concern about states' rights, rejected an *absolute* ban on interstate bank acquisitions that the states could not lift. Petitioners' contention that Congress never expected the states to lift the federal barrier—and hence gave no thought to how the states might do so[43]—is flatly contradicted by the legislative history. That history makes plain that, in empowering the states to raise the federal barrier to interstate acquisitions, Congress intended to restore to the states a measure of their traditional control over banking.

1. Congress Recognized That The Douglas Amendment Authorizes The States To Lift The Federal Barrier.

Although the House of Representatives had first passed a total ban on interstate acquisitions,[44] the Senate Committee on

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that country also become concentrated.

Big banks commonly find it much easier and more to their liking to do business with big business rather than with little business.

Id.

41 *Id.* at 6857-58 (*reproduced in* Jt. App. A12-A13). Significantly, among the then-current "big mergers" which Senator Douglas criticized was the combination of National City and First National Bank in New York to form Citibank (*id.*), the predecessor and principal subsidiary of petitioner Citicorp.

42 Senator Douglas stated:

> [T]he big holding companies, freed from the restraint of my amendment, would undoubtedly keep far ahead of the rest of the pack. These are unequal races, in which the strong usually outdistance the weak.

102 Cong. Rec. 6860 (1956).

43 CitiBr. at 24; NEBr. at 24-25.

44 See pp. 14-15, *supra*.

Banking and Currency reported out a bill that permitted interstate bank acquisitions subject only to approval by the Federal Reserve Board. The Senate Committee bill's treatment of interstate bank acquisitions had won little support,[45] while the House bill's *total* ban on interstate bank acquisitions was attacked as "an unwarranted interference with states' rights."[46]

The dispute was resolved by Senator Douglas' compromise amendment. As proposed and enacted, the Douglas Amendment borrowed the House bill's prohibition of interstate bank acquisitions, but in order to satisfy Senate sensitivities as to states' rights, it empowered the states, if they desired, to lift the federal barrier.[47]

Any doubt as to whether Congress understood that it was affirmatively authorizing the states to lift the federal barrier cannot survive Senator Douglas' remarks to the Senate: because "[a]t present no State specifically grants such permission," "the *immediate* practical effect [of the amendment] would be to bar the expansion of bank holding companies across State lines."[48] "But the amendment *would leave the way open for states to make explicit provision for such purchases and acquisitions if they so decided.*"[49] "Therefore the amend-

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45 That approach was supported by large bank holding companies interested in interstate expansion. *E.g., Control of Bank Holding Companies, 1955:* Hearings on S.880, S.2350, and H.R. 6227 before the Subcomm. of the Sen. Comm. on Banking and Currency, 84th Cong., 1st Sess. 132, 136 (testimony of Ellwood Jenkins), 139 (testimony of John Noonan), 268 (testimony of Arthur B. Tyler), 298 (testimony of Bayard F. Pope). These large companies opposed the Douglas Amendment. 102 Cong. Rec. 6860 (remarks of Sen. Douglas).

46 *Id.* at 6752 (*reproduced in* Jt. App. A8) (remarks of Sen. Robertson, floor manager for the Senate Committee's bill, *quoting* Sen. Maybank).

47 Senator Douglas stated:

> Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States.

Id. at 6860 (*reproduced in* Jt. App. A15); *accord id.* (*reproduced in* Jt. App. A16-A17) (remarks of Sen. Bennett); *id.* at 6862 (*reproduced in* Jt. App. A20) (prepared statement of Sen. Payne).

48 *Id.* at 6860 (*reproduced in* Jt. App. A15) (emphasis added).

49 *Id.* (*reproduced in* Jt. App. A15-A16) (emphasis added).

ment does not freeze the situation."[50] In light of this express recognition that the states were free to permit interstate bank acquisitions, petitioners' claim that Congress assumed that the states would not use their authority is as inaccurate as it is immaterial.

2. *Congress Empowered The States To Lift The Federal Barrier Selectively To Suit Their Own Policies.*

Petitioners' further contention that Congress did not consider how the states might go about exercising their congressionally-conferred power is also rebutted by the legislative history. Senator Douglas explained during the floor debate that, under his amendment, bank holding companies would be permitted to acquire banks in other states "*only to the degree*" that such acquisitions were "permitted by State laws."[51] In describing the Douglas Amendment's effect on interstate bank acquisitions, Senator Douglas made repeated analogy to the McFadden Act's subjection of national banks to state branching restrictions:

> [B]y the McFadden Act and other measures, national banks have been permitted to open branches *only to the degree permitted by State laws* and State authorities.
>
> * * *
>
> [W]hat our Amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our Amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them* . . . .
>
> * * *
>
> [S]o far as interstate acquisition of banks is concerned . . . the provision in my Amendment is in principle almost identical with the present provision which governs branch banking.
>
> Therefore, it is a logical continuation of the principles of the McFadden Act which tried to prevent Federal

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50 *Id.* at 6860.

51 *Id.* at 6858 (*reproduced in* Jt. App. A13) (emphasis added).

> power from being used to permit national banks to expand across State lines in a way contrary to State policy . . . .

102 Cong. Rec. 6858, 6860 (*reproduced in* Jt. App. A13, A16)(emphasis added).

Petitioners assert that the Senator's use of the term "only to the degree" refers not to the *qualitative* extent of any state's power to lift the federal bar, but only to the *number* of states that might choose to to do so.[52] Petitioners engage in similar wishful thinking when they seek to render the analogy meaningless on the ground that the McFadden Act does no more than establish "competitive equality" between federally- and state-chartered banks.[53] These arguments misread both the McFadden Act and the legislative history of the Douglas Amendment.[54]

Congress, in adopting the McFadden Act in 1927, liberalized *federal* restraints on national bank branching, but also chose, as this Court has recognized, "to leave the question of desirability of branch banking [by national banks] up to the states."[55] Attempts between 1927 and 1933 to amend the McFadden Act to allow national bank branching regardless of state law were, as this Court has noted, "strenuously opposed and eventually defeated"; and, with the passage of the Banking Act of 1933, Congress once again determined that national bank branching should be allowed " 'in only those States the

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52 CitiBr. at 28; NEBr. at 26. Not surprisingly, petitioners never seek to reconcile this creative reading (which would suggest that Senator Douglas recognized that any number of states might remove the federal barrier to interstate bank acquisitions) with their contention that the sponsors of the Douglas Amendment did not contemplate that even a single state would raise the federal barrier (see p. 16, *supra*).

53 CitiBr. at 28; NEBr. at 26-27.

54 Petitioners' argument is also contradicted by the fact that, as Senator Douglas expressly noted in his remarks, the states had adopted a multiplicity of restrictions of intrastate bank branching, ranging from total prohibition (Illinois) to creation of separate banking zones (New York, as described in n.64). 102 Cong. Rec. 6858 (*reproduced in* Jt. App. A14). At this time, Pennsylvania permitted branching in contiguous counties. *Upper Darby Nat. Bank* v. *Myers*, 386 Pa. 12, 124 A.2d 116 (1956).

55 *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966).

laws of which permit branch banking, and only *to the extent that the State laws permit branch banking.*' "[56]

Thus, Senator Douglas, by arguing that his amendment brought the McFadden Act approach to the area of interstate bank acquisitions, was explaining that his amendment allows interstate bank acquisitions only insofar as they are permitted under state law, just as national banks are permitted to branch intrastate only to the degree that their home states' laws expressly permit. Thus, the Douglas Amendment was intended to make state law determinative as to whether *interstate* bank acquisitions by bank holding companies should be permissible in the same way that the McFadden Act made state law determinative as to the permissibility of *intrastate* branching by national banks.[57]

Petitioners' claim that Congress never considered the scope of the authorization to lift the federal barrier is plainly contradicted by the remarks of Senator Douglas and Senator Payne, a co-sponsor of the Douglas Amendment. Senator Douglas declared that his amendment should be supported by "[a]nyone who favors States rights."[58] Senator Payne articulated the sponsors' belief that "the control of expansion of bank holding companies across State lines . . . is a matter of primary concern to the State governments and *is an area best left to their discretion. . . .*" 102 Cong. Rec. 6862 (1956) (*reproduced in* Jt. App. A20) (emphasis added).[59]

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56 *Id.* at 259 (emphasis added) (*quoting* Senator Glass, 76 Cong. Rec. 2511 (1933)).

57 *First National Bank* v. *Dickenson*, 396 U.S. 122, 131 (1969) (in the McFadden Act, "state law has been utilized by Congress to provide certain guidelines to implement its legislative policy"); *First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir.), *cert. denied*, 444 U.S. 950 (1979) ("[t]he policymaking role in [the] area [of branch banking] is given to the state legislatures").

58 102 Cong. Rec. 6860 (*reproduced in* Jt. App. A16).

59 Contrary to petitioners' claim that the private respondents' reading of the Douglas Amendment is based on a "few ambiguous comments of Senator Douglas" (CitiBr. at 27; *accord* NEBr. at 25-26), our conclusion as to Congress' intent in the Douglas Amendment is grounded upon a lengthy floor debate over the merits of this single provision of the BHC Act, which included the extensive remarks of four Senators—two co-sponsors and two

There can be little doubt that regional arrangements of the type at issue here are well within the range of the discretion that Congress understood it was conferring on the states. Prior to enactment of the Douglas Amendment, Congress was presented with testimony as to the benefits of a federally-mandated trade-area approach to interstate bank holding company acquisitions.[60] The Committee Report on the House version of the BHC Act specifically noted that Congress had been urged to permit interstate banking operations on, among other things, a "trade-area" or a "Federal Reserve District basis," without regard to the states' own banking laws.[61]

Congress ultimately determined in the Douglas Amendment that the states—not the federal government—should decide how far, if at all, to permit interstate bank holding company acquisitions.[62] Given that determination, it makes perfect sense that Congress itself declined to include in the BHC Act, as a

opponents of the amendment. 102 Cong. Rec. 6856-63 (1956) (*substantial excerpts reproduced at* Jt. App. A9-A20). Petitioners' reliance on precedents in which this Court rejected proffered statutory constructions based on " 'isolated fragments' " of legislative history (CitiBr. at 27; NEBr. at 26) is thus entirely misplaced. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (rejecting proposal based on a single expression of "hope" as to how Congress might act); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history" when they are contradicted by "the Reports of both Houses and the statements of other Congressmen").

60 *Control of Bank Holding Companies, 1955: Hearings on S. 880, S. 2350,* and *H.R. 6227 before the Subcomm. of the Sen. Comm. on Banking and Currency*, 84th Cong., 1st Sess. 145 (1955) (testimony of John T. Noonan):

> Restriction of bank holding companies to trade areas such as Federal Reserve Districts would be entirely logical and defensible. Restriction of bank holding companies to the purely historical geographical areas composing the States, however, would appear to have no foundation in logic at all . . . . We find it difficult to see how a Federal Congress empowered by the Constitution to disregard State lines in administering affairs relating to banking and currency can justify this discriminatory treatment of the small States of the country.

61 H.R. Rep. No. 609, 84th Cong., 1st Sess. 2 (1955).

62 See pp. 16-18, *supra*.

matter of federal law, any provision *mandating* a regional approach to interstate bank acquisitions, notwithstanding a state's desire to the contrary.[63] By the same token, Congress plainly was aware that there were active proposals to permit interstate bank acquisitions on a regional basis. This awareness did not lead Congress to limit its grant of authority to the states. On the contrary, it enacted a broadly worded provision that was clearly understood to leave the states free to exercise their own judgment and discretion in this area, including the freedom to pursue regional arrangements.[64] Under these circumstances, state regional approaches are within the realm of acceptable choices that states may make under the Douglas Amendment. At the very least, those who argue that they are without Congress' authorization must bear a heavy burden of explaining why Congress, if its intention was to the contrary, did not simply say so.

Even the petitioners find themselves ultimately unable to contend that no form of selective state lifting of the Douglas Amendment's general prohibition can be sustained.[65] As petitioners recognize, the states have enacted a variety of statutes pursuant to their Douglas Amendment authority, and *none* of these laws fully removes the federal barrier to interstate bank acquisitions. Some states have enacted statutes authorizing interstate acquisitions only by "grandfathered" out-of-state

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63 *Congress'* inclusion of such a provision in the Act would have been antithetical to the prevailing view that the states' policies should hold sway in this area. See pp. 16-18, *supra*. For this reason, petitioners are wide of the mark with their suggestion that the failure of Congress itself to impose interstate bank acquisitions on a trade-area basis reflects an affirmative intent to reject a regional approach to interstate bank acquisitions. Obviously, Congress simply left this issue to be decided by the states in exercise of the discretion granted to them.

64 Nor were the suggestions of a "trade-area" approach the only material that alerted Congress, in considering the Douglas Amendment, to the possibility of regional banking arrangements. In the course of repeatedly analogizing his amendment to the McFadden Act, Senator Douglas specifically noted that New York had divided itself into ten distinct zones for branch banking purposes (102 Cong. Rec. 6858 (*reproduced in* Jt. App. A14-A15)), thereby adopting a regional approach to intrastate expansion.

65 CitiBr. at 37; NEBr. at 30 n.28.

bank holding companies with some prior presence in the state;[66] others have chosen to permit interstate purchases only of failing local banks;[67] and still others have authorized interstate acquisitions only of "special purpose" banks—for example, banks engaged exclusively in credit card operations—on the condition that they provide significant employment for local residents and not compete significantly with locally-controlled, full-service banks.[68] Petitioners do not and could not plausibly deny that each of these other types of laws is discriminatory on its face, for every one of them unquestionably treats some or all out-of-state bank holding companies, by virtue of their status as such, differently from—and more restrictively than—all in-state holding companies.[69]

Petitioners nonetheless seek to distinguish this array of discriminatory legislation from regional statutes because the former supposedly involve less of a burden on interstate commerce.[70] This proposition is dubious in the extreme. For example, the "special purpose" bank statutes for which petitioner Citicorp has successfully lobbied[71]—and which peti-

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66 *E.g.*, Fla. Stat. Ann. § 658.29(3)(d) (West Supp. 1983); Iowa Code Ann. § 524.1805 (West Supp. 1982-83).

67 *E.g.*, Wash. Rev. Code ch. 30.04.230(a).

68 *E.g.*, Del. Code Ann. tit. 5, § 801, *et seq.* (Supp. 1982); Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1983); Va. Code. § 6.1-392 (1983).

69 The remaining types of statutes that a few states have enacted pursuant to the Douglas Amendment are similarly non-uniform and conditional, and therefore, in petitioners' terms, are discriminatory or obstructive in their operation. New York has enacted a statute that permits interstate acquisitions only by out-of-state bank holding companies whose home states permit acquisitions by New York bank holding companies (N.Y. Banking Law § 142-b (McKinney Supp. 1983)); Alaska permits interstate acquisitions by out-of-state bank holding companies only of banks formed before a specified date (Alaska Stat. § 06.05.235 (Supp. 1984)); and Maine imposes on interstate acquisitions capital and "net new funds" limitations that do not apply to intrastate acquisitions (Me. Pub. Law 1983, ch. 302, § 2. as amended, ch. 597, § 3 (1984)).

70 *E.g.*, CitiBr. at 37; NEBr. at 4-5.

71 *See Banks Decontrol Bid In States*, N.Y. Times, Mar. 26, 1983 at 29, col.3 (March 26, 1983); *Inside Citicorp*, N.Y. Times, § 6, at 15, col.3 (May 29, 1983).

tioners understandably take great pains to distinguish—are unmistakably marked by the "local parochialism" that this Court has consistently condemned.[72] It is strange indeed to defend the blatant home-state favoritism embodied in these statutes as less constitutionally suspect than the Connecticut and Massachusetts Acts, which grant no favors to resident banks *vis-a-vis* out-of-state institutions, but at most favor one group of outsiders over another.[73] In any event, the degree of the discrimination against interstate commerce does not distinguish these other types of statutes for constitutional purposes. This Court's decisions make clear that even where a statute's burden on commerce is light, it must "regulate[ ] evenhandedly," and not favor local over out-of-state in-

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72 The Delaware statute, for example, ensures that the acquired local bank will pose no significant competition for locally-based banks by requiring: (1) that it be a newly established rather than an existing bank; (2) that it have only one office in the state; and (3) that it be "operated in a manner and at a location that is not likely to attract customers from the general public," Del. Code & Tit. 5, Section 803 (Supp. 1982). In-state bank holding companies and their bank subsidiaries are not subjected to these statutory shackles. If its local favoritism were not already clear enough, the Delaware law also requires that the newly-acquired special purpose bank provide a certain number of Delaware jobs within one year of opening. *Id.* Few discriminations against out-of-state businesses could be more obvious or more parochial.

73 State action that favors local over out-of-state business interests is particularly suspect under the Commerce Clause, because it creates the fear that the state is engaging in economic protectionism *at the expense of outsiders*, who are not represented in the state legislature that enacted the discriminatory law. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-68 n.2 (1945); *accord South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U.S. 177, 184-85 n.2 (1938). This concern is inapposite here. *First*, home-state favoritism has been imposed as the norm by Congress itself in the Douglas Amendment, and the challenged Acts, by partially lifting the federal barrier to interstate acquisitions, *reduce*, rather than increase, "*local* parochialism." *Second*, neither Connecticut nor Massachusetts has favored *its own* bank holding companies over unrepresented out-of-state interests. At most, each has favored one group of unrepresented outside interests over another such group. Since there is no regional political body in which New England bank holding companies are represented and New York holding companies are not, petitioners' desperate attempt to transform Commerce Clause antipathy for *local* parochialism into a similar distaste for *regional* parochialism cannot succeed.

terests.[74] *Each* of these other laws enacted pursuant to the Douglas Amendment's authorization involves, on its face, some form of discrimination; none of them even purports to regulate evenhandedly.[75]

The various state statutes championed by petitioners do not violate the Commerce Clause for one reason—because Congress in the Douglas Amendment gave the states authority to lift selectively the amendment's general prohibition of interstate bank acquisitions. If this were not the case, the states would be confronted with an "all or nothing" choice—that is, a choice between permitting acquisitions by all out-of-state bank holding companies on equal terms with in-state banking organizations or not permitting any interstate acquisitions at all. But petitioners themselves have abandoned their earlier advocacy of any such "all or nothing" construction of the Amendment.[76] By urging the validity of other state laws that

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74 *E.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 36-37; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

75 Absent congressional authorization, such facially discriminatory state statutes would in fact be subject to this Court's rule of *per se* invalidity under the Commerce Clause. *See, e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

76 *Compare* JA (2d Cir.) 1463-64, 1518-19, 1565-70, *with* CitiBr. at 37 and NEBr. at 30n.28. Contrary to petitioners' position, several *amici* seek reversal of the judgment below by renewing this all-or-nothing argument. *E.g.*, Brief of The Chase Manhattan Corporation at 4, 11, 15; Brief of The New York Clearing House Ass'n, at 10-13; Brief of The State of New York, at 13-15.

There is, if possible, even less merit to the distinct and more extreme position urged by amicus curiae The Bank of New York Co. ("BNY") that, once a state purports to lift the federal barrier even in part, the result is an automatic total lifting of the barrier, by court decision, despite the statute's terms. Brief of BNY, at 6-10. Although BNY's reading would affirm the decision below, it would do so by standing the Douglas Amendment on its head. Under this approach, the legislature of a state which, like Connecticut, had lifted the bar of the Douglas Amendment in part, would subsequently learn that it had unintentionally authorized entry on a far broader basis than it had ever imagined. For this reason, BNY's position would, if adopted by the Court, effect the judicial repeal of the Douglas Amendment's requirement that interstate bank acquisitions be "specifically authorized by the statute laws of the State in which such bank is located *by language to that effect and not merely by implication.*" 12 U.S.C. § 1842(d) (emphasis

partially or selectively leave the federal barrier in place, petitioners have effectively conceded the controlling consideration here: Congress has empowered the states to enact legislation that removes the Douglas Amendment's prohibition for some but not all out-of-state bank holding companies.[77]

This Court itself has specifically recognized that the Douglas Amendment authorizes the states "to *create exceptions*" to the amendment's general prohibition of interstate bank acquisitions.[78] In the challenged statutes, Massachusetts and Connecticut have done no more than to *create exceptions* for interstate acquisitions by bank holding companies based in other New England states that accord reciprocal acquisition privileges to

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added). It would also do extreme violence to the deference to state control of banking that is the heart of the Douglas Amendment. See pp. 18-20, *supra*. BNY's position has been thoroughly considered and emphatically rejected by the Board. *Bank of New York Co.*, 70 Fed. Res. Bull. 527 (1984).

77 This conclusion is consistent with the interpretation of the Douglas Amendment by the United States Court of Appeals for the District of Columbia Circuit —the only court other than the court below that has squarely addressed the Douglas Amendment and its legislative history in a case involving an interstate bank acquisition. In *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), the District of Columbia Circuit expressly held that Congress anticipated "that states might be *selective* in allowing bank holding companies to cross state lines," and considered it "*obvious*" from the legislative history that the amendment's purpose was "to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion *would not contravene state policy*." 511 F.2d at 1296-97 (emphasis added); *accord Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1708 (1984) ("the Douglas Amendment empowered states to *discriminate* among out-of-state holding companies when deciding which could enter") (emphasis added).

Likewise, the Board itself has since 1973 "consistently construed the Douglas Amendment to authorize states to limit or restrict entry by out-of-state holding companies" in removing the amendment's general prohibition of interstate acquisitions. *Bank of New York Co.*, 70 Fed. Res. Bull. 527, 528 (1984); *accord NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982); *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983); *Northwest Bancorporation*, 38 Fed. Reg. 21530, 21531-32 (1973), *aff'd*, *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975). The Board has *never* found such state selectivity to be impermissible.

78 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 47 (emphasis added).

Massachusetts and Connecticut banking organizations, respectively.[79] The Massachusetts and Connecticut Acts thus are entirely appropriate exercises of the authority Congress conferred in the Douglas Amendment.

In establishing the states as policy-making centers for determining whether and to what degree to permit interstate bank acquisitions, Congress departed dramatically from a nationally uniform approach to interstate commerce. Even if the legislative record on this score were not as clear as it is, respect for Congress as a coordinate branch of government precludes a presumption that it took so large a step with its eyes shut, and meant to entrust to the states a more limited authority than its plain language conferred.

C. The Precedents Limiting Judicial Inference Of Congressional Authorization For Discriminatory Or Obstructive State Legislation Are Inapposite Where Congress Itself Has Rejected The Premise Of National Economic Unity.

This Court has never considered congressional displacement of the dormant Commerce Clause in the context of a federal statute, like the Douglas Amendment, which imposes universal

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79 As a consequence, the Massachusetts and Connecticut Acts are entirely consistent with this Court's further observation in *Lewis* that "it is doubtful that [the Douglas Amendment] authorizes state *restrictions* of any nature on bank holding company activities." *Id.* (emphasis added). The Acts do not restrict any in-state activities of bank holding companies once they have entered a state; rather, as contemplated by this Court in *Lewis*, they serve only to create exceptions to the general *federal* prohibition and thereby "*permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Id.* (emphasis in original). Moreover, the Acts concern *bank* acquisitions whereas this Court's holding in *Lewis* was limited to *nonbank* activities of bank holding companies. *Id.* at 44.

Finally, contrary to petitioner Northeast's claim, the Connecticut statute's anti-leapfrogging provisions in no way " 'assert extraterritorial jurisdiction over persons or property' " (NEBr. at 19 n.21) (*quoting Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982)). Those provisions simply regulate the *ownership* of banks located in *Connecticut*; they pose no more of a bar to interstate acquisitions than do the parallel anti-leapfrogging provisions of New York's reciprocity statute, N.Y. Banking Law § 142-b(a)(i) (McKinney's 1983 Supp.), a statute whose validity under the Commerce Clause petitioner Northeast defended before the Board. JA (2d Cir.) 1467-69.

discrimination against interstate commerce, while authorizing the states to alleviate that discrimination if they wish. In light of the Douglas Amendment, this Court's understandable reluctance lightly to infer congressional intent to authorize departures from dormant Commerce Clause norms can have no application.

It is beyond cavil that Congress may exercise its plenary power under the Commerce Clause to "confer[ ] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[80] Where Congress has done so, "any action taken by a state within the scope of the congressional authority is rendered invulnerable to Commerce Clause challenge."[81] The negative implications of the Commerce Clause simply do not then apply to the states any more than they do to Congress itself.[82] Petitioners' reliance upon precedents holding that such congressional authorization of state legislation must be stated "expressly"[83] or "explicitly"[84] wholly ignores the unique interaction between federal and state law under the Douglas Amendment.

Any "discrimination" said to result from the challenged statutes is not the creation of anything that Connecticut and Massachusetts have done or enacted, but is the *residue* of the congressionally-imposed discrimination that those states have declined to dissipate.[85] Thus, insofar as one may label what

80 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44; *accord Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945) ("Congress has undoubted power to redefine the distribution of power over interstate commerce . . . to permit the states to regulate the commerce in a manner which would otherwise not be permissible").

81 *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653 (1981).

82 *Id.* at 652-53.

83 *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982).

84 *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. at 653-54.

85 *See Bank of New York Co.*, 70 Fed. Res. Bull. 527 (1984) (the Douglas Amendment, rather than Connecticut law, prohibits a New York bank holding company from acquiring a Connecticut bank); *Mellon Na-*

Massachusetts and Connecticut *omitted to do* as generating burdensome, obstructive or discriminatory consequences, one need find *no* further congressional authorization for these results, since Congress itself imposed them.[86] To whatever degree the demand for clear congressional authorization is understandable as a requirement that the national legislature consider and approve the obstruction or discrimination at issue,[87] that assurance is amply present where Congress has done even *more* by affirmatively *legislating* such discrimination.[88] There simply is no basis in this context for concern as to whether Congress has "authorized" states to *leave in place*—by their complete or partial inaction—"discriminatory" exclusions that would follow as a matter of federal law from the statutory bar that Congress itself has *enacted*.[89]

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tional Corp., 70 Fed. Res. Bull. 441 (1984), *aff'd*, *Girard Bank* v. *Board of Governors*, 748 F.2d 838 (3d Cir. 1984) (application by Pennsylvania holding company to acquire New Jersey bank barred by Douglas Amendment, rather than by New Jersey law). Indeed, the Board, on at least one occasion, has denied an application for approval of an interstate acquisition even though the Attorney General of the target bank's home state had issued an opinion to the effect that the acquisition would not violate state law. Because the acquisition was not expressly permitted on the face of the state statute, the transaction was prohibited as a matter of federal law. *First Bank System, Inc.*, 70 Fed. Res. Bull. 771 (1984) (Montana bank holding company controlled by Minnesota bank holding company is barred by the Douglas Amendment from acquiring Utah bank; Utah statute expressly permits acquisitions by holding companies in Montana, but not by those based in Minnesota).

86 See pp. 11-16, *supra*.

87 *See, e.g.*, CitiBr. at 11, 13, 15, 19, 21, 30-31; NEBr. at 11-12, 20-21, 25.

88 See pp. 11-16, *supra*.

89 As the Douglas Amendment's opponents argued, Congress' establishment of "discrimination" as the norm for interstate bank acquisitions is a "strange approach, out of harmony" with the traditional norm of a national common market. 102 Cong. Rec. 6860 (*reproduced in* Jt. App. A17) (remarks of Sen. Bennett). Congress' decision nonetheless to adopt that approach alters the Commerce Clause analysis. *See White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves Inc.* v. *Stake*, 447 U.S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *id.* at 815 (Stevens, J., concurring) ("[o]ur cases finding that a

Petitioners ask this Court to be satisfied with nothing less than verbatim congressional authorization of the precise manner in which Massachusetts and Connecticut have exercised their authority to lift the federal ban on interstate bank acquisitions. But nothing in this Court's precedents supports so "talismanic" a requirement.[90] Even where Congress has not *itself* balkanized the country with respect to a sphere of commerce, but has merely indicated a willingness that *states* take such decentralizing action on their own, this Court has held that Congress' removal of the dormant Commerce Clause obstacle to state action permits states to act "subject only to the exceptions *expressly* provided for" by Congress. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 405, 430-31 (1946) (emphasis added).

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state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market" and do not apply where interstate commerce "would never have existed in the first instance" had the state not acted). Under these cases, dormant Commerce Clause norms are of radically reduced significance where the states, far from obstructing or interfering with pre-existing private commerce, have augmented interstate commerce by removing obstacles not of their own creation. By allowing entry by some out-of-state bank holding companies, Massachusetts and Connecticut have clearly augmented interstate commerce and have indeed reduced the degree to which their home-state holding companies are favored over those from outside. See nn. 73, 89.

90 Only last Term, this Court emphasized that "[t]here is no *talismanic* significance" to any particular test for determining when Congress has authorized the states to adopt legislation in a particular area of interstate commerce that would otherwise offend the dormant Commerce Clause; the essential concern simply is that Congress has "*unmistakably evidenced* its intent to do so." *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984) (emphasis added). The Douglas Amendment clearly satisfies this standard. See pp. 11-16, *supra*.

Indeed, petitioners fail to note that the 1983 bill sponsored by Senator Tsongas and Representative Frank, which petitioners acknowledge "would have given federal approval to" the Massachusetts and Connecticut Acts (CitiBr. at 7; NEBr. at 7), does not itself satisfy the requirement of minute specificity that petitioners would read into this Court's precedents. That bill would have required only that "the Board shall give effect to any laws" of the six New England states which permit interstate acquisitions involving banks in any of the other New England states. S. 1002, 98 Cong., 1st Sess. (April 7, 1983). Nowhere did the bill expressly sanction discrimination against interstate commerce or reciprocal attempts to lift the federal barrier, as petitioners would require (see citations at n.87).

Following *Prudential*, in *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), this Court rejected the argument that the McCarran-Ferguson Act should be construed so as not to permit a retaliatory state tax that discriminated *among* out-of-state insurers because the McCarran-Ferguson Act, like the Douglas Amendment, did not mention discrimination by state-of-origin. This Court emphasized that it could find no basis for an anti-discrimination "limitation" on the explicitly-authorized state power regarding insurance "in the language or the history of the Act." 451 U.S. at 653. Nor is there any basis to infer any such limitation in light of the balkanization worked by the Douglas Amendment itself.[91] And, in any event, the results achieved by the Douglas Amendment's interaction with what Massachusetts and Connecticut have done—and omitted to do—fall well within the range of what Congress contemplated.[92]

Those cases in which this Court has hesitated, in the absence of clear congressional intent, to infer congressional permission for state obstructions of a free national market are plainly distinguishable. Each of those cases involved a situation in which Congress had not itself enacted a statute expressly designed to make fragmentation and balkanization the norm.[93]

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91 See pp. 11-15, *supra*.

92 See pp. 16-27, *supra*.

93 In the precedents upon which petitioners rely where this Court rejected congressional authorization claims, the claims were based on federal non-pre-emption and other savings clauses which did no more than leave standing whatever valid state laws had previously existed or on other federal provisions which created federal policies as to federal instrumentalities or federal property without addressing state action as such. None of the federal statutes at issue in these cases barred interstate commerce as does the Douglas Amendment. *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237 (1984) (Congress, in mandating in-state processing of timber taken from *federal* lands, did not authorize a parallel restrictive in-state processing requirement imposed by state law with respect to *other* than federal lands); *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 388 n.15 (1983) (no specific federal

Reluctance to permit such a result where it was not legislated by Congress itself—*and* not clearly within the scope of a congressional grant of authority to the states—makes eminent sense in terms of enforcing a presumption of national unity as a negative implication of the dormant Commerce Clause. But when the Commerce Clause has been "awakened" and its negative implication unmistakably rejected by Congress as a matter of positive federal law, judicial reticence to allow the evolution of subnational economic units would make no sense at all. Worse, it would represent a clearly impermissible imposition of a judicial preference for a unitary nationwide system where Congress—in an undoubted exercise of its constitutional power to do so[94]—has instead opted for a less centralized approach. It is *that* course, proposed by petitioners, and not the one taken by the Second Circuit, that would "arrogate[ ] Congress' policy-making function" to the federal judiciary.[95]

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clause); *Sporhase* v. *Nebraska*, 458 U.S. 941, 959 (1982) (clauses of 37 federal statutes—saving state water rights statutes from pre-emption by the federal enactments and subjecting questions concerning water rights that arise in relation to federal projects to pre-existing valid state laws—do not empower a state to restrict exportation of groundwater); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982) (in § 201(b) of the Federal Power Act, "Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy; by its plain terms, § 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise 'lawful' "); *United States* v. *Public Utilities Commission*, 345 U.S. 295, 304 (1953) (federal statute embodied only a congressional grant of power to a *federal* agency).

Section 7 of the BHC Act constitutes a non-pre-emption clause:

> The enactment by the Congress of [the BHC Act] shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846. As this Court has stated, Section 7 of the BHC Act "was intended to preserve existing state regulations of bank holding companies, even if they were more restrictive than federal law." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 48-49 (emphasis added). The existence of this provision itself precludes construing the Douglas Amendment as would petitioners—that is, as nothing more than an acknowledgment of *otherwise* valid state laws.

94 See n. 34.

95 CitiBr. at 13; *see id.* at 30, 49; NEBr. at 12.

II. THE MASSACHUSETTS AND CONNECTICUT ACTS EFFECTUATE THE POLICY OF LOCAL CONTROL THAT ANIMATES THE DOUGLAS AMENDMENT.

The Douglas Amendment was enacted to preserve local access to and control over banking and credit in the face of the assault by large bank holding companies on the barriers to interstate branch banking imposed by the McFadden Act and related legislation.[96] For some years following the amendment's passage, interstate barriers remained largely intact and state control over local banking systems was maintained. But in the past decade, the localized banking system has once again come under attack from a variety of quarters, notwithstanding the restraints imposed by the Douglas Amendment and the McFadden Act.

Since the beginning of the 1970s, there has been a considerable expansion in the authority of bank holding companies to own and operate so-called "nonbank subsidiaries"[97] engaged in such bank-related activities as consumer and commercial finance, mortgage lending, and lease financing.[98] Because the acquisition and establishment of such nonbank subsidiaries are not restricted by the Douglas Amendment or the McFadden Act,[99] larger bank holding companies have used such subsidiaries to extend their operations far beyond the borders of their home states.[100] Indeed, petitioner Citicorp alone now operates

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96 See pp. 4-6, *supra*.

97 Under Section 4 of the BHC Act, bank holding companies are generally prohibited from owning stock in companies other than banks, but may own companies that provide services found by the Board to be "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).

98 In amending the BHC Act in 1970, Congress expanded the Board's authority to determine the nonbank activities in which bank holding companies may engage. *See generally* JA (2d Cir.) 2415.

99 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44.

100 *See id.; Ginsburg, Interstate Banking*, 9 Hofstra L. Rev. 1133, 1175, 1185 (1981); Frieder, *Legislating For Interstate Bank Expansion; Financial Deregulation and Public Policy*, 9 J. Corp. Law 673, 687-79, App. V-XI, XV (1984).

in forty-one states, largely through a web of nonbank subsidiaries.[101]

Although such nonbank subsidiaries were the initial means by which large banking organizations have invaded local banking systems since 1956, they are no longer the only such device. Technology has contributed significantly to this process; the development of interstate networks of automatic teller machines—which have been held not to constitute impermissible interstate banking operations[102]—has further eroded interstate barriers. Nor are large banking organizations the sole force behind such erosion. Some of the most severe effects can be traced to "the emergence of far-flung networks of outlets that organizations such as Sears, Merrill Lynch, Shearson/American Express and many others" have created "to compete on a local level with services" that banks traditionally have provided—but which are free of the federal restrictions applicable to banks.[103]

Thus, despite Congress' efforts in the Douglas Amendment and elsewhere, large banking and nonbanking companies are increasingly and aggressively moving to establish extensive

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101 See affidavit of Walter J. Connolly, Jr., in Opposition To Petitioners' Request For A Stay in the Second Circuit ("Connolly Affidavit"), Jt. App. A23. All told, bank holding companies operate more than 5,800 nonbanking offices throughout the United States. *See* Syron, Table 2 (JA (2d Cir.) 2416). Indeed, even as this brief is being completed, Citicorp is seeking to work out an arrangement whereby Maryland would amend its interstate bank acquisition statute (see n. 68) so as to permit Citicorp to convert its existing special purpose bank subsidiary into a full service bank—with the result that Citicorp would become the only out-of-state bank holding company permitted to operate such a bank in Maryland. *N.Y. Times*, March 9, 1985, at p. 29.

102 *See, e.g., Independent Bankers Association* v. *Marine Midland Bank*, Nos. 84-7424, 7448 (2d Cir. Feb. 27, 1985).

103 JA (2d Cir.) 1236. The money-market mutual fund is the most prominent product that such nonbanking organizations have successfully marketed throughout the nation in direct competition with local banking institutions.

interstate financial systems. There is no sign that this process will soon abate; if anything, it appears to be accelerating.[104]

The legislators who enacted the Connecticut and Massachusetts Acts were well aware of these developments. The creativity of money-center bankers and the pace of technological change have not altered the desire of such legislators that their states and communities continue to be served by locally-controlled and community-oriented banking systems, as the Douglas Amendment makes possible, rather than only by the local outlets of large, distant financial conglomerates.[105] The task confronting these legislators was the preservation of some semblance of local orientation in their banking systems in the midst of a rapidly changing banking environment.

The regional approaches taken by the challenged statutes reflect Connecticut's and Massachusetts' attempts to strike a balance among the need to retain locally-oriented banking institutions,[106] the goal of strengthening those indigenous enti-

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104 The most recent attempt to avoid interstate banking restrictions is the "nonbank bank"—a financial institution that either accepts demand deposits or makes commercial loans, but not both—and thus is not considered a bank for purposes of the BHC Act. 12 U.S.C. § 1841(c) (*described* at n.11). *See generally* Syron at 7 (JA (2d Cir.) 2417) Also see n. 98.

105 For example, the legislators who enacted the Connecticut Act considered it important "not only to Connecticut banking but to the entire economy [of the] state and the business community of [the] state that [Connecticut] banking institutions [remain] in business as home grown Connecticut banking institutions." JA (2d Cir.) 1259-60 (remarks of Conn. Sen. Schneller). Similarly, the Hebb Commission Report, which was prepared for the Connecticut legislature and led to the introduction of the Connecticut Act (see n. 112), stressed the desirability of maintaining, to the extent possible, a locally-oriented banking system: "To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and business would not . . . serve our state well." JA (2d Cir.) 1240.

106 [T]he regional interstate banking approach can be expected to be responsive to regional economic needs and development. This expectation is based upon the fact that asset and liability sources of regional banks are more interdependent, vis-a-vis the asset [and] liability sources of money center banks. . . . [A]sset allocation criteria would

ties so that they are not ultimately overwhelmed by the awesome resources of remote money-center banks,[107] and the desire to invite outside competition so as better to serve local banking needs.[108] Those statutes were enacted with a clear appreciation that full-fledged interstate banking might well be inevitable.[109] In light of the historical, cultural and financial ties that bind their region together across state lines, Massachusetts and Connecticut have sought through the Acts to provide an opportunity for the development of at least some locally- and regionally-based banking organizations that have the resources to compete effectively against the nation's largest financial concerns, whose interstate activities are increasing.[110]

The regional approach to bank acquisitions embodied in the Acts is in the nature of an experiment. In 1983—in the wake of a presidential report that recommended "*a phased relaxation*

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necessarily be more responsive to the region in which these banks operate.

Frieder, *An Orderly Transition To Interstate Banking*, 164 *The Bankers Magazine*, Mar./Apr. 1981, 47, 52.

107 *See* JA (2d Cir.) 1240-1242.

108 JA (2d Cir.) 1239, 1243.

109 As the Connecticut Act's chief state senate sponsor remarked: "[W]e know that sometime in the future we're going to have interstate banking. It's just a question of time . . . ." JA (2d Cir.) 1273 (remarks of Sen. Sullivan). This point was in fact made repeatedly during the course of the Connecticut legislature's consideration of the Act. *E.g.*, JA (2d Cir.) 1252 (remarks of Sen. Sullivan); JA (2d Cir.) 1327 (remarks of Rep. Kezer).

110 Thus, the Connecticut Act was specifically advocated as "legislation . . . that . . . allows our Connecticut banks to get into the merger process with some banks of their equal size and, hopefully, within the next few years, will enable them to develop the kind of muscle and financial strength to be able to compete on a national basis . . . ." JA (2d Cir.) 1259 (remarks of Sen. Schneller). Likewise, the Act's state senate sponsor emphasized that the legislation was intended to "give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking" so that they can "still provide the service, the loan power of the banks that we have in Connecticut today to our Connecticut consumers." JA (2d Cir.) 1252 (remarks of Sen. Sullivan); *accord* JA (2d Cir.) 1315, 1333, 1335 (remarks of Rep. Onorato).

of current geographic restraints"[111]—the Hebb Commission, established in 1979 by the Connecticut General Assembly to study interstate banking,[112] decided that "to expose our smaller banks to the rigors of unlimited competition from large out-of-state banking organizations . . . would not be wise."[113] In deference to the congressionally-endorsed interest in "promotion of local ownership and control of banks [and] the preservation of a close relationship between those in our communities who need credit and those who provide it[114]—and in recognition of the "natural economic and cultural community of interest among the New England states that would make . . . an experiment in regional banking a reasonable first step toward interstate banking"[115]—the Hebb Commission concluded that it was first "necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking."[116] The General Assembly concluded its five-year review of interstate banking by adopting the Commission's recommendations.[117]

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111 *Geographic Restrictions on Commerical Banking* at 17 (emphasis in original). Congress had required preparation of this Report in the International Banking Act of 1978, 12 U.S.C. § 611 *et seq.*

112 Public Act 79-563, Conn. Gen. Stat. Ann. § 36-5(b). The Commission consisted of leading legislators, distinguished lawyers, a former banking commissoner and prominent bankers. JA (2d Cir.) 1229.

113 JA (2d Cir.) 1240-41.

114 *Id.* at 1240.

115 *Id.* at 1242.

116 *Id.; accord id.* at 1241 ("By 'experiment' we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking").

117 The wisdom of providing Connecticut with a limited experiment to test the desirability of interstate banking was the subject of extensive debate. JA (2d Cir.) 1245-87, 1288-1372. Thereafter, the Senate rejected an amendment which would have struck the geographic feature by authorizing the acquisition of Connecticut institutions by any out-of-state bank holding company, wherever located, whose home state provided reciprocal acquisi-

What petitioners pejoratively dismiss as protectionist in this approach is none other than the fulfillment of Congress' design. For Connecticut's and Massachusetts' desire to foster and maintain some element of local orientation within their respective banking systems is entirely consistent with the Douglas Amendment's fundamental purpose of enabling states to control their banking systems' development and thereby to keep alive the tradition of banks indigenous to, familiar with, and attentive to the needs of, the local communities.[118] Such state efforts are not, however, consistent with the interests of our nation's largest banks—as this case itself makes abundantly clear. If the essential purpose of the Douglas Amendment is given effect here and the challenged statutes are sustained, local banking organizations based *outside* the principal money centers will inevitably grow and become much more serious threats than they are or can be today to major money-center financial organizations.[119] The net result will be increased competition for the nation's largest financial organizations in the evolving interstate environment that those organizations currently dominate and would like to continue to dominate.

It is undoubtedly for this reason that the petitioners take pains to obscure the fact that the immediate effect of a decision in their favor here would *not* be to remove restrictions

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tion opportunities for Connecticut banking organizations. JA (2d Cir.) 1276-82. Both houses also rejected amendments under which the geographic feature would have expired *automatically* after two years. JA (2d Cir.) 1311-20.

118 In fact, Congress itself, in recently providing federal authority for interstate acquisitions in the narrow context of failing federally-insured banks (see pp. 43-44, *infra*), also adopted a regional approach that reflects its continuing concern with the maintenance of locally-controlled and community-oriented institutions: Congress specified that the Federal Deposit Insurance Corporation, in the event no offer from an in-state bank is made, shall consider offers by out-of-state institutions to acquire a failing federally-insured bank, and "shall give priority to offers from [institutions based in] adjoining States." 12 U.S.C. § 1823(f)(6)(C).

119 At present, petitioner Citicorp has more than three times the assets of *all* six New England banking organizations involved in the challenged transactions and, through its subsidiaries, has total deposits over 30 percent greater than the combined deposits of all the commercial banks in all of the New England states. Connolly Affidavit, Jt. App. A22-A23.

on their interstate expansion but rather to reimpose restraints on the growth of competitors, such as the private respondents. Thus, if the Connecticut and Massachusetts Acts were invalidated, the Douglas Amendment's general prohibition on interstate acquisitions would once more be fully operative in those states, and the development of Connecticut and Massachusetts banking organizations would be restricted accordingly. In such an environment, it is the large money-center financial organizations that would be left to flourish in "unequal races,"[120] unchallenged by developing organizations based elsewhere. That result would stand the Douglas Amendment on its head.

III. THE MASSACHUSETTS AND CONNECTICUT ACTS NEITHER CONSTITUTE NOR REFLECT AN INTERSTATE COMPACT REQUIRING CONGRESS' EXPRESS APPROVAL.

Petitioners argue that the Massachusetts and Connecticut Acts are part of an "exclusionary" New England compact invalid under the Compact Clause for lack of specific congressional approval. But the Acts create no new regional structure, mount no challenge to federal supremacy, and effect no change in the political relationship among the several states. Indeed, petitioners' portrayal of the Massachusetts and Connecticut Acts as part of an exclusionary group "boycott" disregards the fact that the reciprocity provisions of the challenged statutes, from which petitioners infer an "agreement," do not exclude non-New England bank holding companies; the Douglas Amendment does that.

A. The Massachusetts And Connecticut Acts In No Way Alter The Balance Between Federal And State Powers.

This Court has held that the only interstate arrangements that require congressional approval under the Compact Clause are those which tend to increase the political power of the states in a manner that encroaches upon or otherwise interferes with the just supremacy of the federal government. *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 471 (1978); *Virginia* v. *Tennessee*, 148 U.S. 503, 519

120 See n. 42.

(1893). The Massachusetts and Connecticut Acts do neither, even assuming *arguendo* that they are part of a New England agreement. Thus, they do not require specific after-the-fact approval from Congress.[121]

1. No Third Level Within The Federal Structure Has Been Created.

In *Multistate Tax Commission*, some 21 states had adopted legislation establishing a "Multistate Tax Compact" to coordinate the taxation of businesses that generate income in several states. The legislation created a commission composed of the member states' tax administrators, and empowered it to study state tax systems, develop proposals for uniform state tax laws, adopt advisory uniform administrative regulations, and conduct audits on behalf of member states.

In rejecting a Compact Clause challenge, this Court concluded that the legislation—notwithstanding its creation of a multistate authority—did not enhance the political powers of

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121 Here, as in *Multistate Tax Commission*, Congress has not yielded to requests to bless the challenged statutes in *haec verba*. Since even the proponents of such legislative initiatives did not believe them necessary in light of the authorization already conferred upon the states by the Douglas Amendment itself, all of petitioners' declamations about the negative implications of what Congress did *not* do add up to nothing. In reporting out the Garn bill, which was passed by the Senate by an 89-5 vote on Sept. 13, 1984, and not acted upon by the House, the Senate Committee on Banking and Currency stated that it "believes that the state statutes concerning interstate banking [such as the Connecticut and Massachusetts Acts] are consistent with both the constitution and the federal banking statutes . . . ." S. Rep. No. 98-560, 98th Cong., 2d Sess., 49 (1984). During the Senate floor debate on the bill, proponents made clear that it was "merely a clarification of the powers that the States have always retained under the Douglas Amendment. . . ." 130 Cong. Rec. 11153 (1984)(prepared statement of Sen. Garn); *accord id.* at 11153 (prepared statement of Sen. Tsongas).

In any event, this Court has long recognized that unenacted legislative proposals do not provide a reliable guide to the meaning of an existing law enacted by a prior Congress. *E.g.*, *Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981). Nor is congressional inaction on such a proposal significant, for Congress may well have concluded that the existing law is adequate and requires no revision. *See, e.g.*, *American Trucking Ass'ns* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416-18 (1967).

the compacting states in a manner that impinged upon the powers of the federal government:

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, . . . each state is free to withdraw at any time.[122]

All of this is, of course, true in the present case. Indeed, the statutes of Massachusetts and Connecticut present a far less serious Compact Clause issue than did the legislation upheld by this Court in *Multistate Tax Commission*. Massachusetts and Connecticut have created *no* independent multi-state authority with power to *do* or even *study* anything.[123] The banking organizations that result from the transactions at issue would each consist, in essence, of a bank holding company with separate, wholly *intrastate*, banking subsidiaries.[124] Each state would continue to regulate—to the extent presently permissible—the operations and acquisitions of banking institutions found within its borders using its own existing regulatory framework and banking officials. And the federal government,

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122 434 U.S. at 473.

123 The Acts not only fail to create any regional authority, they do not even establish a homogeneous New England banking region. The various New England states have exercised their prerogatives under the Douglas Amendment in varying manners: one state permits acquisitions by out-of-state bank holding companies throughout the nation; three others permit such acquisitions on a regional basis, although one of the three will soon expand its permission to encompass non-New England bank holding companies; and the remaining two do not permit interstate acquisitions at all. See pp. 6-7, *supra*.

124 Under the provisions of federal banking law, national banks and member banks of the Federal Reserve System may not branch outside their home state, nor may national banks consolidate with other national or state banks located outside their home state. See n.31; *accord* Conn. Gen. Stat. Ann. § 36-59 (only in-state banks may open branch offices in Connecticut); *id.* §§ 36-92, 36-93 (only banks located within the state may be merged or consolidated).

acting through the Board, would continue to regulate all bank holding company acquisitions in precisely the same manner as prior to the enactment of the challenged statutes.

Massachusetts and Connecticut have thus exercised their own sovereign power without attempting to confer even a semblance of sovereignty upon a third level of government. As in *Multistate Tax Commission*, each state is free unilaterally to terminate its legislation at any time. Thus, the Massachusetts and Connecticut Acts—like the arrangement in *Multistate Tax Commission*—clearly were not intended to, and do not, increase the cumulative power of the purportedly "compacting" states.

Nor can *Multistate Tax Commission* be distinguished on the ground that the arrangement there was open to all states. Whether an exclusively regional multistate *agency*, with authority to take at least some kind of *action* with regard to an important governmental function such as taxation, would have satisfied the Compact Clause is not a question presented in this case; the Acts in no sense address the relationships among states as governmental units. They concern only the powers of *private parties*. In any event, no arrangement between Massachusetts and Connecticut, and nothing in either state's laws, purports to prevent the other state from extending the benefits of reciprocal interstate bank acquisitions to holding companies outside New England.[125]

There is, finally, no substance whatever in petitioners' attempt to distinguish *Multistate Tax Commission* on the ground that, there, the "potential harmful effects" of the multistate legislation "could have been imposed" on appellants "without entering into an agreement."[126] That is equally true in this case. For example, had only Massachusetts (or only Connecticut) enacted a regional bank acquisition statute, or had both enacted such statutes with no reciprocity provisions,[127] peti-

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125 See pp. 46-47, *infra*.

126 CitiBr. at 44; NEBr. at 36.

127 It is settled that the enactment of reciprocal legislation does not in itself create a compact. *See United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 469-70; *Bode* v. *Barrett*, 344 U.S. 583, 586 (1953); *New York* v. *O'Neill*, 359 U.S. 1, 9-10 (1959).

tioners would complain of precisely the same "exclusion." Thus the exclusionary effects of which petitioners complain have no relationship to any conceivable "agreement."

2. There Is No Encroachment Upon Federal Interests.

The only examples petitioners offer to suggest that the Massachusetts and Connecticut Acts encroach upon the federal government's regulation of banking cannot withstand analysis. The federal government's interest in regulating bank acquisitions is spelled out in Section 3 of the BHC Act. Section 3(c) requires that the Federal Reserve Board, before approving a bank acquisition, consider the competitive effects of the acquisition, the financial and managerial resources of the acquiring company, and the needs of the communities to be served. 12 U.S.C. § 1842(c). The Board must make favorable determinations on each factor before approving any interstate or intrastate bank acquisition. That the Massachusetts and Connecticut Acts do not interfere in any way with the Board's fulfillment of this federal function is demonstrated by the fact that the Board was able to make the required findings in this case.[128]

The Acts surely do not interfere with any federal interest in the extent to which interstate bank acquisitions are permitted. Under the Douglas Amendment, these state policy determinations have been made controlling for federal purposes.[129] Because the Acts *embody* the federal interest in interstate bank acquisitions, they cannot *encroach* upon it. It is in this sense that the Board, in rejecting petitioners' Compact Clause claim, described the Douglas Amendment as a congressional "renunciation of federal interest in" regulating the permissibility of interstate bank acquisitions.[130]

Petitioners' further claim that the Acts conflict with a federal failing bank statute is little short of frivolous. The relevant federal statute contemplates that the Federal Deposit

128 Pet. App. A41-A48, A75-A78, A80-A82.

129 See pp. 18-20, *supra*.

130 Pet. App. A52.

Insurance Corporation ("FDIC") will arrange acquisitions of failing or failed banking institutions by out-of-state bank holding companies where in-state alternatives are unavailable or unsatisfactory.[131] The statute explicitly overrides the Douglas Amendment and "any other provision of law, State or federal," to the contrary.[132] Because the federal statute expressly renders the Massachusetts and Connecticut Acts inapplicable where they otherwise might conflict with it, there is no potential for interference by the Acts.[133]

B. The Massachusetts And Connecticut Acts Do Not Affect Other States In A Manner That Implicates The Compact Clause.

1. The Connecticut And Massachusetts Acts Do Not Affect Any State's Sovereignty.

Petitioners argue that the Massachusetts and Connecticut Acts "pose[ ] a direct affront to the sovereignty of excluded sister states."[134] But nowhere do petitioners explain how or in what manner any state's sovereignty is affected by the Massachusetts or Connecticut Acts. Unlike the compacts addressed by the Framers, which resolved state boundary disputes raising fundamental issues of sovereignty,[135] the Acts challenged here deal only with *private* corporate transactions far removed from sovereign affairs. Indeed, this Court has expressly ruled that no approval by Congress is required under the Compact Clause where "legislation on the part of two or more States" reciprocally permits corporate entities of each state to enter the other.

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131 12 U.S.C. § 1823(f), enacted as part of the Garn-St Germain Depository Institutions Act of 1982 (*also discussed* at n. 118).

132 12 U.S.C. § 1823(f)(4)(i).

133 In the event of any putative conflict, the FDIC could proceed with a proposed acquisition, confident that the Massachusetts or Connecticut Acts would be preempted to the extent necessary by federal law. *See Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152–53 (1982).

134 CitiBr. at 41-42; *accord* NEBr. at 3, 31.

135 *See* CitiBr. at 38; NEBr. at 34; Acts Passed At a General Assembly of the Commonwealth of Virginia, October Session 1785, at 15.

St. Louis & San Francisco Ry. Co. v. *James*, 161 U.S. 545, 562 (1896) (*cited in United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 469, and *Bode* v. *Barrett*, 344 U.S. at 586).

In the absence of any impact on other states' sovereignty, the "exclusion" about which petitioners complain is simply not subject to Compact Clause review. This Court has confirmed repeatedly that the Compact Clause defines "the proper balance between federal and state power."[136] Accordingly, "the relevant inquiry must be one of impact on our federal structure"; the "test is whether the [Acts] enhance[ ] state power *quoad* the National Government."[137] State legislation purporting to determine the internal boundaries of the Union, or addressing issues similarly affecting the very scope of state sovereignty, might well require Compact Clause scrutiny insofar as such statutes reshape the federal structure. Yet respondents have been unable to find *any* case in which this Court has held even such state legislation to constitute an unauthorized "Agreement or Compact." The case at hand is an extraordinarily inappropriate vehicle in which to depart from that unbroken tradition. For this Court has never held, and neither its precedents nor the historical underpinnings of the Compact Clause remotely suggest, that state legislation governing private corporate transactions has *any* impact on our federal structure sufficient to implicate the Compact Clause.[138]

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136 *E.g.*, *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. at 471.

137 *Id.* at 471, 473. Indeed, the very reason for the requirement that compacts be approved by *Congress*—rather than the states—is "to check any infringement on the rights of the *national* government." J. Story, Commentaries on the Constitution ¶ 1403 (1833) (emphasis added).

138 It cannot aid petitioners' cause to recall the internecine struggles which plagued the nation under the Articles of Confederation, and which led, in the commercial context, to the adoption of the Commerce Clause. *See*, *e.g.*, CitiBr. at 38-39; NEBr. at 13. For the Constitution's solution to that problem was to place interstate commerce in the hands of the national legislature, and in the instant case it is Congress itself which has determined that the norm of national unity does not best serve the national interest in the field of bank acquisitions. See pp. 11-15, *supra*. Thus, fears of state-imposed

2. *The Exclusionary Effects Of Which Petitioners Complain Do Not Derive From Any Purported "Agreement" Between Connecticut And Massachusetts.*

At bottom, petitioners' Compact Clause arguments rest on the notion that Massachusetts and Connecticut have formed an exclusionary "confederation[ ] to boycott sister states."[139] That notion is rhetoric, not reality. Even assuming that some of the New England states might be deemed to have "agreed" to open their borders to each other's bank holding companies,[140] there is no conceivable basis for inferring an *agreement* among them to *exclude* bank holding companies of other states.

Neither the Connecticut nor the Massachusetts Act requires, as a condition of reciprocity, that other states' interstate banking statutes include a regional limitation.[141] The reciproc-

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national division are irrelevant. Indeed, Massachusetts and Connecticut, by exercising the power conferred upon them in the Douglas Amendment, have moved in the direction of more, not less, national unity.

139 CitiBr. at 12; *accord id.* at 5-6, 36; NEBr. at 3, 32.

140 The spectre of conspiratorial confederation conjured by petitioners cannot be made into a concrete constitutional challenge by their energetic invocation of metaphors drawn from antitrust law. Even a less allegorical antitrust assault on what Massachusetts and Connecticut have done could hardly surmount this Court's holding that the Sherman Act has no application to state action with nationwide anticompetitive effects. *Parker* v. *Brown*, 317 U.S. 341, 350-52 (1943). Quite apart from the fact that petitioners' insinuations of boycott are chronologically unfounded (*see* pp. 6, 36-37, *supra*), it simply cannot be the law that otherwise valid state enactments may be fatally infected by showing that those who drafted or sponsored them acted with eyes over one anothers' shoulders. No conception either of the respect due the sovereign states, or of the institutional limits of the federal judiciary, could possibly warrant a new Compact Clause doctrine requiring this Court—or Congress, for that matter—to probe the deliberative process leading to the enactments of otherwise valid state laws in order to condemn statutes whose structure and impact, viewed without regard to such imaginative musings, would leave them invulnerable to this sort of attack.

141 Nor have Massachusetts and Connecticut sought to induce each other—or any other state—to exclude non-New England bank holding companies. The reciprocity provision of each statute merely provides an inducement for other New England states to *open* their borders to the bank holding companies of Massachusetts or Connecticut.

ity accorded to the bank holding companies of Maine—which allows acquisitions of its banks by bank holding companies located in New York and elsewhere—demonstrates that the exclusion of non-New England bank holding companies does not derive from any purported "agreement" between Massachusetts and Connecticut.[142]

To the extent that bank holding companies outside New England may be barred from acquiring Connecticut or Massachusetts banks, that *exclusionary* effect derives from the Douglas Amendment—and, even under petitioners' theory, would derive from the legislation that the two individual states enacted, with or without reciprocity, and not from any agreement between them. While the purportedly exclusionary effects that result from the interaction of federal and state law could be thought to raise an issue under the Commerce Clause but for the Douglas Amendment, they plainly do not implicate the Compact Clause. As petitioners themselves concede, when "the individual states could have imposed identical effects . . . without entering into an agreement," there can be no violation of the Compact Clause.[143]

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142 Similarly, the Massachusetts and Connecticut Acts permit interstate acquisitions between banking institutions in either of those states and Rhode Island, even though Rhode Island will permit entry by non-New England bank holding companies after June 30, 1986. See p. 6, *supra*.

143 CitiBr. at 44, *citing Multistate Tax Commission*, 434 U.S. at 478 ("risk of any potential harmful effects was 'independent of the Compact' "); *accord* NEBr. at 36.

Conclusion

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
Counsel for Intervenor-Respondent Bank of New England Corporation

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Counsel for Intervenor-Respondent Hartford National Corporation

MARK A. WEISS
STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Intervenor-Respondent Bank of Boston Corporation

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No. 84-363

In The
SUPREME COURT OF THE UNITED STATES

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and
BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR INTERVENOR-RESPONDENT COMMONWEALTH OF MASSACHUSETTS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

THOMAS R. KILEY
FIRST ASSISTANT
ATTORNEY GENERAL
COUNSEL OF RECORD

JAMIE W. KATZ
ASSISTANT ATTORNEY
GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108
(617) 727-1033

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Congress, which has prohibited interstate banking generally but, through the Douglas Amendment, authorized individual states to lift that prohibition, thereby authorized states to expand interstate commerce by allowing limited, regional interstate banking.

2. Whether a Massachusetts statute which expands interstate commerce by allowing regional interstate banking, violates the Commerce Clause.

3. Whether a Massachusetts statute enacted pursuant to the Douglas Amendment, which authorizes out-of-state holding companies to purchase Massachusetts banks, but only if the home states of such companies offer reciprocal privileges to Massachusetts companies, violates the Compact Clause.

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 740 F.2d 203 and is reproduced at Pet. App. A21-A33. The judgment of the Court of Appeals is reproduced at Jt. App. A3-A4.

The order of the Board of Governors of the Federal Reserve System ("Board") approving the merger of Bank of New England Corporation and CBT Corporation is reported at 70 Fed. Res. Bull. 374 (1984) and is reproduced at Pet. App. A34-A71; the Board's order approving the acquisition by Hartford National Corporation of Arltru Bancorporation, Inc. is reported at 70 Fed. Res. Bull. 353 (1984) and is reproduced at Pet. App. A72-A78. Finally the Board's order approving the acquisition by Bank of Boston Corporation of Colonial Bancorp, Inc. is reported at

70 Fed. Res. Bull. 524 (1984) and reproduced at Pet. App. A79-A86.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on August 1, 1984. A timely petition for a writ of certiorari was granted on January 7, 1985. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause (Art. I, §8, cl. 3) and the Compact Clause (Art. I, §10, cl. 3) of the United States Constitution; 12 U.S.C. §1842(d) ("Douglas Amendment"); a Connecticut statute, 1983 Conn. Act. 83-411 (Reg. Sess.); and a Massachusetts statute, Mass. Gen. Laws. Ann. ch. 167A, §2 (West Supp. 1984). These constitutional

and statutory provisions are reproduced at Pet. App. A95-A102.

STATEMENT OF THE CASE

This case centers on the constitutionality of a Massachusetts statute, enacted in accordance with congressional authorization, to permit limited interstate banking which is otherwise federally prohibited. It turns, however, on the construction and application of that congressional authorization, for Massachusetts maintains that its statute does not contravene the negative implications of the Commerce Clause because Congress has authorized such statutes in enacting the Douglas Amendment. The Massachusetts statute expands the local, decentralized banking system established by Congress and expands interstate commerce by removing, albeit selectively, a general

federal ban on interstate banking. The case also requires analysis of a Connecticut law which, with the Massachusetts statute, presents similar and parallel but non-simultaneous expressions of state authority consistent with federal law.

1. The Bank Holding Company Act

The Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§1841 et seq. (the "BHC Act") provides, in Section 3, that a bank holding company may not acquire control of a bank or another bank holding company without the prior approval of the Board.[1/]

1/ The BHC Act defines a "bank holding company" as a company that controls any bank or bank holding company. 12 U.S.C. §1841(a)(1). In pertinent part, 12 U.S.C. §1841(c) defines a "bank" as an "institution organized under [federal or state law] which (1) accepts deposits withdrawable on demand and (2) engages in the business of making commercial loans."

Section 3(d) of the BHC Act, known as the Douglas Amendment, governs the interstate acquisition of banks by bank holding companies. The Douglas Amendment prohibits the Board from approving any acquisition of a bank located in one state by a bank holding company with its principal place of business located in another state, unless:

> the acquisition...is specifically authorized by the statute laws of the state in which such bank is located, by language to that effect and not merely by implication.2/

2. The Massachusetts and Connecticut Actions under the Douglas Amendment.

In December, 1982, Massachusetts enacted an interstate bank acquisition statute which partially lifted the

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2/ 12 U.S.C. §1842(d)(1)

federal ban on interstate bank acquisitions.[3/] The Massachusetts Act authorizes out-of-state bank holding companies to acquire Massachusetts banking entities if two conditions are met. First, the out-of-state bank holding company must have its base in one of the other New England states. Second, the home state of the acquiring bank holding company must afford reciprocal acquisition privileges to Massachusetts banking entities. Connecticut enacted a similar statute governing interstate bank acquisitions in June, 1983.[4/]

3/ Mass. Gen. Laws Ann., ch. 167A, §2 (West Supp. 1984) ("Massachusetts Act") (Pet. App. A101-A102).

4/ 1983 Conn. Acts, Pub. Act. No. 83-411 (Reg. Sess.) ("Connecticut Act") ("Pet. App. A99).

The enactment of the Massachusetts Act and the Connecticut Act constituted the first authorization by those states of interstate banking under the Douglas Amendment; previously all bank acquisitions of Massachusetts and Connecticut banks by foreign bank holding companies had been prohibited.

The Massachusetts Act allowed interstate banking within New England where federal law previously barred it. The challenged state law itself does not prohibit bank holding companies from outside New England from acquiring New England bank holding companies with banks located in Massachusetts. Any restraints on interstate acquisitions arise, rather, from the operation of the Douglas Amendment and the BHC Act.

3. Proceedings Below

Following enactment of the Massachusetts and Connecticut Acts, the Bank of New England, based in Massachusetts, agreed to merge with CBT Corporation, in Connecticut; Hartford National Corporation, also of Connecticut, agreed to acquire Arltru Bancorporation, a Massachusetts corporation; and Bank of Boston Corporation, in Massachusetts, agreed to acquire Colonial Bancorp, Inc., of Connecticut. The Board received applications for approval of these transactions. The petitioners have intervened to oppose Board approval, contending that the statutes violate the Commerce Clause and the Compact Clause.

In March, 1984, the Board held that the Connecticut and Massachusetts Acts provided the express statutory authori-

zation for interstate bank acquisitions required by the Douglas Amendment. (Pet. App. A37, A74, A83). In addition, the Board found that it lacked an adequate basis for declaring that the Acts violate the United States Constitution. (Pet. App. A38-A41, A49-A71, A74-A75, A83). The Board noted that other state statutes which permit out-of-state bank holding companies under narrow circumstances "appear to assume that the states have full discretion to set the terms of entry of out-of-state bank holding companies." (Pet. App. A71). The Board also observed that the history of the Douglas Amendment does not suggest that the states must choose between a complete prohibition on out-of-state bank holding company acquisitions and allowing wholly unfettered

entry to out-of-state bank holding companies. (Pet. App. A71).

On appeal, the Second Circuit Court of Appeals affirmed the Board's orders. The Second Circuit found that the Massachusetts and Connecticut Acts promoted, rather than restricted, interstate commerce. In addition, the Second Circuit concluded that, as to the Commerce Clause, "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here." (Pet. App. A31). The Court of Appeals also held, as to the Compact Clause challenge, that even if the Acts "were treated as a compact," that would not "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." (Pet. App. A31-A32).

SUMMARY OF THE ARGUMENT

I. Congress has vested in the states primary responsibility for establishing policy in the field of bank expansion through interstate acquisitions or branching. This congressional deference is consistent with the history of the banking industry, which has traditionally been decentralized. This decentralized structure has resulted from legislative concerns with both overarching federal regulation and excessive economic concentration. Therefore, both the state and national banking systems over time have incorporated a host of restrictions which show a preference for strong local banks. Congress has taken cognizance of the uniqueness of the banking industry by enacting the McFadden Act, the Bank Holding Company Act of

1956, and the Douglas Amendment, which divide the nation into fifty banking units. The Douglas Amendment prohibits interstate acquisitions among individual states unless individual states lift the prohibition, so that states can control the expansion of bank holding companies across state lines. A number of states have exercised this congressional grant of authority by enacting a variety of limited restrictions on interstate bank acquisitions, while other states have not lifted the Douglas Amendment ban.

Massachusetts traditionally has closely regulated the banking industry, and only recently allowed limited interstate banking. The challenged Massachusetts Act represents a reasonable but cautious step beyond the historical

isolation of Massachusetts banking. The Massachusetts Legislature has chosen to allow banks in the state to expand, but only in a manner which will ensure that the banks remain sensitive to local needs. This action by Massachusetts comports with the language, purpose and historical background of the Douglas Amendment.

II. The Massachusetts Act does not violate the Commerce Clause both because the Douglas Amendment authorizes the Act and because the Act in no way imposes a burden on interstate commerce. The states are constrained by the negative implications of the Commerce Clause, but Congress operates under no such restraints. Congress may restrict or even prohibit interstate commerce, and Congress has, with unmistakeable clarity,

prohibited all interstate bank acquisitions and then allowed individual states to create exceptions.

It is Congress that has established a scheme in which discrimination is the norm and protection of local interests is the guiding principle. This Court has recognized that where Congress not only renounces a federal interest, as in the area of insurance, but also affirmatively advances local, parochial interests, Congress has provided an express grant of authority for the regional restriction at issue.

These congressional actions demonstrate that the underlying premises of the Commerce Clause do not apply to the banking industry. Ordinary Commerce Clause principles presuppose an intent to create an economically unified nation,

with unrestricted trade among the states. The Douglas Amendment, by contrast, establishes a divided, decentralized, local banking economy which preserves state boundaries. Massachusetts has chosen to expand upon the geographic restrictions imposed by the Douglas Amendment, and to look beyond traditional, parochial notions, a choice which is wholly consistent with the congressional intent to protect the states and allow them to establish bank acquisition policy.

The petitioners' claims of a Commerce Clause violation also fail because the Massachusetts Act does not burden interstate commerce. The Act <u>expands</u> interstate commerce, while it is Congress, through the Douglas Amendment, which has restricted interstate commerce.

III. The Massachusetts Act does not violate the Compact Clause since no compact exists. The New England states have not acted uniformly; rather, Massachusetts, Connecticut, Vermont, and Rhode Island have established different forms of statutes, with different dates of enactment, while Vermont and New Hampshire have not enacted statutes lifting the Douglas Amendment. Moreover, the Massachusetts and Connecticut Acts do not create any independent third level of government or multistate authority. Massachusetts has given up some authority, rather than augmented its power. Finally, since Congress has already divided the nation into fifty bank units and protected the right of states to set bank expansion policy, Massachusetts has not interfered with federal supremacy in

any way by enacting its regional restriction.

ARGUMENT

I. CONGRESS HAS ESTABLISHED THE PRIMACY OF THE STATES IN DETERMINING BANK EXPANSION POLICIES.

The petitioners' assertion that the Douglas Amendment does not authorize states to partially lift the general federal ban on interstate banking, reflects both a refusal to recognize the unique history of banking and a failure to acknowledge congressional intent. The history of banking in the United States reveals that states have long controlled how banks would expand, whether by acquisition or by branch banking. In contrast to the more familiar exercise of Commerce Clause power to enhance a national, unified economy, in

dividing the nation into state-bounded banking units, Congress has recognized, approved, and helped create the unique, decentralized structure of the banking industry. A look at the historical congressional regulation of the banking industry as well as the language and legislative history of the Douglas Amendment, show that the Douglas Amendment indeed authorizes the statutes at issue in this case.

A. Historically, The Banking Industry Has Been Geographically Compartmentalized.

"There has long been opposition to the exercise of federal power in the banking field." First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966) reh'g denied, 385 U.S. 1032 (1967). This opposition stems,

at least in part, from a concern with an excessive concentration of economic power in large financial institutions. Geographic Re- strictions on Commercial Banking - The Report of the President, Department of the Treasury at 1(1981).

One major consequence of the historical concern with excessive federal authority over banking is the dual banking system, in which banking institutions with state charters stand side by side with nationally chartered banks. The dual banking system began in the early 1800's. White, Banking Law 8 (1976). It continues in effect today with a sophisticated network of federal regulation imposed on the state systems, with simultaneous important deferrals to the states within the federal scheme. This decentralized banking system has developed

approximately 15,000 commercial banks. Geographic Restrictions on Commercial Banking--The Report of the President, Department of the Treasury at 1 (1981).

In addition to the distinctions between state and federal banks, there also exist different forms of financial institutions (e.g., commercial banks and savings and loan institutions). Beyond these divisions within the banking industry based on charters and functions, there lie major geographic barriers as well. Both federal and state law incorporate restrictions which demonstrate the national preference for local, decentralized banking. States have generally prohibited out-of-state banks from opening branches within their borders, and many states have quite severely limited branch banking even within their

boundaries. Glidden, Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System, 1980 U. Ill. L.F. 369, 374. Massachusetts has limited branch banks to areas within the same county as the main bank, or to within forty miles of the main bank. Mass. Gen. Laws Ann. ch. 167C, §3 (West. Supp. 1984).

Congress has also ensured that national (i.e., federally chartered) banks have only limited power to expand by branching so that charters for national banks could not function as a mechanism for avoiding state regulation. The McFadden Act, adopted in 1927 and amended in 1933, 12 U.S.C. §36, serves as the foundation of this federal policy. The McFadden Act limits national banks to the same branching powers as those ex-

pressly permitted to state banks under state law. As a result of the McFadden Act, banks chartered by the federal government cannot operate nationally. Congress intended to leave the question of the desirability of branch banking up to the states. First National Bank of Logan v. Walker Bank & Trust Co., 385 US 252, 258 (1966) reh'g denied, 385 U.S. 1032 (1967). As one commentator has noted, the McFadden Act raised state boundaries "to a level of mystical significance for geographic expansion by commercial banks, with many states free to restrict branching areas even further, or prohibit branching altogether." Golembe, "The Evolving Banking Structure" in The Bankers' Handbook (Baugher & Walker, ed.) 1112 (1978).

A significant exception to this general rule emerged before the turn of the

century through the use of bank holding companies. Such companies, which acquire bank stock and exert control over banks, became important by the early 1920's as a means to expand across state lines. Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1291 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975); Glidden, 380; The Bank Holding Company Amendments of 1970, compiled by Carter A. Golambe Associates, Inc., 1 (1971). As of 1955, even where a state prohibited interstate and branch banking, a bank holding company could still expand into that state by acquiring banks. Glidden, 382; See Transamerica Corp. v. Board of Governors of Federal Reserve System, 206 F.2d 163 (3rd Cir.), cert. denied, 346 U.S. 901 (1953).

Congress responded to this loophole in the geographically segregated system of banking with the passage of the Bank Holding Company Act of 1956. Section 3 of the BHC Act prohibits any acquisition of a bank by a bank holding company without the prior approval of the Board. The Douglas Amendment, or section 3(d), goes even further to promote state primacy by prohibiting the Board from approving any interstate acquisition of a bank by a bank holding company unless the state in which such bank is located has passed a statute expressly authorizing such an acquisition. The Douglas Amendment's purpose was to assure that states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy. Iowa Independent Bankers, 511 F.2d at 1297.

Section 4 of the BHC Act prohibits bank holding companies from engaging in any non-banking activity other than those expressly enumerated therein. In addition, Congress guaranteed that the new legislation would not trench upon the state's traditional authority to regulate banking by providing in section 7 of the BHC Act:

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any state from exercising such powers and jurisdiction which it now or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. §1846.

The BHC Act's legislative history thus demonstrates a congressional intent to protect the traditional American banking system with its dependence upon independent, locally focused institu-

tions, and a desire to impede the growth of large centralized multistate bank holding companies. The House report on the legislation states:

> Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests. The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the community's industrial and commercial activities and from the farming population within its vicinity or trade area. Its activities are usually fully integrated with the local economic and social organization. The bank holding company device threatens to destroy this democratic grassroots institution.

H.R. Rep. No. 609, 84th Cong., 1st Sess., 1-2 (1955).

Through the McFadden Act, the BHC Act, and the Douglas Amendment, Congress restricted branch offices and holding company acts to a single-state framework, except that states could choose to lift the ban on interstate acquisitions.

The Douglas Amendment is, as Senator Douglas noted, a "logical continuation" of the McFadden Act, with its emphasis on deference to state policy decisions.[5/] Predictably, and in accor-

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5/ Senator Douglas stated, in support of his amendment:

> I wish to repeat that, so far as inter-state acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other states, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

(footnote continued)

dance with the importance of state prerogative in the regulation of banking, a host of distinct state interstate banking laws have followed in the wake of the Douglas Amendment. The states have exercised the power entrusted to them by the Douglas Amendment with a broad spectrum of restrictions on interstate acquisitions. Various states have prohibited wholesale bank expansion by limiting access to bank holding companies located in reciprocal states, or by limiting the

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(footnote continued)

> Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across state lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a state.

102 Cong. Rec. 6860 (1956) (Jt. App. A16).

functions performed by the out-of-state banks so that they do not compete with in-state banks. The challenged regional restriction differs only in that it is linked to geography; indeed, the regional restriction is less restrictive than some other restrictions. See Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1291 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975).[6/] The states involved all have

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6/ For example, a number of states limit entry by out-of-state bank holding companies to the establishment of special purpose banks which are prohibited from, or restricted in, competing with in-state banks. See, e.g., Del. Code Ann., Title 5, §801 et. seq. (Supp. 1984); Md. Fin. Inst. Code Ann. §5-903 (Supp. 1984). Another state, Maine, allows acquisition by any out-of-state bank but imposes capital and other limitations. Me. Pub. Law 1983, ch. 302, §2, as amended (1984). New York allows bank holding companies to enter the state only if the home state of the bank holding company permits acquisitions by New York holding companies. N.Y. Banking Law §142-6 (McKinney Supp. 1984).

recognized that the Douglas Amendment authorizes states to lift the general ban on interstate bank acquisitions with restrictive, incremental steps.

B. Massachusetts Has A Strong Interest In Allowing Only Limited Interstate Banking And Has Done So In A Reasonable Manner.

The Commonwealth has a long-settled policy of careful regulation of the banking industry in Massachusetts. Its statutes distinguish among banking corporations and provide the different categories of banks with a variety of powers including, among others, the power to receive deposits, the power to lend money, and the power to invest in different kinds of securities. See, e.g., Mass. Gen. Laws Ann. ch. 167, §15A; ch. 167D, §2; ch. 167E, §§2, 6, 7; ch. 167F, §2. The Massachusetts Legislature has

also enacted a number of provisions which carefully limit the powers and authorities of these corporations. See, e.g., Mass. Gen. Laws Ann. ch. 167B, §3; ch. 167D, §3; ch. 170, §§22, 25, 26; ch. 171, §§13, 21.

In consonance with this historical pattern of retaining local control over banking, until 1982 the Commonwealth wholly prohibited banks and bank holding companies located outside Massachusetts from merging with Massachusetts banks or setting up branches in Massachusetts. The challenged Act represents a small, reasonable liberalization of the traditional insulation of the Massachusetts banking industry. It opens up the Commonwealth to out-of-state interests, but limits those who may acquire Massachusetts banks to the relatively small group

of banks located in the other New England states. Those New England banks will generally have assets at levels comparable to those of Massachusetts banks, and will have grown with a focus on very similar local needs. This cautious venture into interstate banking reflects the Massachusetts Legislature's continuing interest in retaining control over bank expansion, an interest consistent with this Court's recognition that banking is "of profound local concern." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 38 (1980).

This legislative restraint results from several legitimate concrete concerns. For example, the Commonwealth has only a limited ability to restrict the entrance of a variety of financial institutions, which perform many of the

same functions as banks, into Massachusetts. The BHC Act does not prevent out-of-state bank holding companies from establishing commercial loan offices in Massachusetts and providing numerous other financial services. Financial institutions have altered their traditional forms -- often precisely to avoid specific regulatory or statutory limitations -- and numerous financial institutions have expanded quite rapidly into interstate commerce. Glidden, 382. States may therefore wish to exercise even more vigilance in patrolling the boundaries still protected.

Furthermore, in passing the Act, the Legislature could reasonably determine that Massachusetts industries have grown sufficiently large to require servicing from larger banks than presently exist

in the Commonwealth. Or the Legislature may simply have wanted to improve the financial health of Massachusetts banks. At the same time, however, the Legislature retained its traditional and legitimate interest in limiting the wholesale absorption of Massachusetts banks by much larger and less responsive out-of-state banks, in the flow of money out of the Commonwealth, in the disruption of local businesses, and in the ability of state agencies to regulate enormous out-of-state bank holding companies. The Legislature, therefore, struck a balance between these competing interests by expanding interstate banking, and thereby expanding interstate commerce, while also ensuring that the larger banks remain sensitive to local concerns and local economic needs. While

the nationally and internationally focused New York banks may believe that the New England restriction does not have a rational basis, the Massachusetts General Court could reasonably find that the historical, cultural, geographical, and economic ties of the region provide good grounds for allowing only New England banks to enter Massachusetts.

These interests and actions of Massachusetts mesh precisely with the concerns that motivated the enactment of the BHC Act and the Douglas Amendment. Massachusetts has consistently demonstrated a strong interest both in regulating banks and in ensuring that banks remain sensitive to local needs. The Douglas Amendment places the decision as to whether to allow interstate banking in the hands of the state, and Massachusetts has exer-

cised that congressional grant of authority in a responsible and constitutionally permissible manner. This congressional intent to provide the states with protection to allow them to develop their own bank expansion policies serves as an important backdrop to the petitioners' constitutional claims.

II. THE MASSACHUSETTS ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

The Commerce Clause claims raised by the petitioners rest upon two contentions: first, that Congress, in the Douglas Amendment, has not provided a sufficiently precise authorization to override the Commerce Clause; and second, that the Massachusetts Act burdens interstate commerce. These contentions fly in the face of law and logic.

A. Congress Has Authorized The States To Set Conditions On Interstate Bank Acquisitions.

The Commerce Clause vests in Congress plenary powers to regulate interstate commerce in any manner which does not conflict with other specific constitutional provisions. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Commerce Clause prohibits state legislation only as a result of its negative implications; that is, the Commerce Clause contains an implied limitation on the power of states to interfere with, or impose burdens upon, interstate commerce. Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 652 (1981).

Congress, however, is not bound by the negative implications of the Commerce Clause. Indeed, Congress has authority

to burden or prohibit interstate commerce altogether. E.g., Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946) (The "scope [of the Commerce Clause] enables Congress not only to promote but also to prohibit interstate commerce."). Moreover, Congress may exercise its plenary power under the Commerce Clause "by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980). Cf. McCarran-Ferguson Act, 15 U.S.C. §§1011-1015; Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 653 (1981) (Congress removed all Commerce Clause limitations on the authority of states to regulate the business of insurance

when it passed the McCarran-Ferguson Act). This Court has held that congressional intent to authorize state legislation that would otherwise violate the Commerce Clause must find "unmistakably clear" expression. South-Central Timber Development, Inc. v. Wunnicke, ___ U.S. ___, 104 S. Ct. 2237, 2242 (1984). Congress has, in enacting the Douglas Amendment, provided that clear expression.

The exercise of identifying the congressional purpose behind the Douglas Amendment "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Park 'n Fly, Inc. v. Dollar Park and Fly, Inc., __U.S.__, 105 S. Ct. 658, 662 (1985); Mills Music, Inc. v. Snyder, ___ U.S. ___, 105 S. Ct. 638,

645 (1985). Additionally, "[a]s in all cases of statutory construction, [the Court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

In the Douglas Amendment, Congress, with unmistakeable clarity, prohibited all interstate bank acquisitions in the absence of state legislation lifting the prohibition. Congress afforded each state the freedom to carve out its own exceptions from the general ban and in doing so, established a regime quite unlike that analyzed by this Court in other Commerce Clause cases: Congress itself implemented geographic compartments for the banking industry; Congress directed that states have authority to

bar any or all out-of-state bank holding companies, and that if states do not act, wholesale discrimination will be the norm; Congress dictated that the protection of local economic interests is more important than a unified national banking industry. Massachusetts submits that the congressional mandate, embodied both in the statute and its legislative history, to prohibit out-of-state bank acquisitions, provides the express authorization for Massachusetts to act in a less protectionist fashion, while still guarding local banks and local supplies of credit to buttress the local economy.

Support for this contention may also be gleaned from this Court's prior decisions in Commerce Clause cases involving different congressional grants of authority, particularly the McCarran-Ferguson

Act. The petitioners cite the McCarran-Ferguson Act, as an example of an "unambiguous" approval of a burden on interstate commerce imposed by the states. Citicorp brief, 21. In at least one sense, however, the McCarran-Ferguson Act affords states less protection than does the Douglas Amendment. The McCarran-Ferguson Act authorizes states to regulate the business of insurance. If a state takes no affirmative action, the McCarran-Ferguson Act imposes no regulatory scheme and provides a state with no protection. In stark contrast, if a state fails to regulate interstate banking, the Douglas Amendment will affirmatively protect the interests of that state by barring movement of interstate bank holding companies by acquisition into that state. In Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946),

the Court dealt with congressional approval of state regulation and taxation of insurance in the McCarran-Ferguson Act and held that states were free to act in light of the congressional grant of authority in the McCarran-Ferguson Act. Id. at 430-31. More recently, this Court found that Congress had removed all Commerce Clause limitations on the authority of states to regulate and tax insurance companies where a retaliatory state tax discriminated against out-of-state insurers, even though the McCarran-Ferguson Act did not expressly authorize such discrimination. Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 652-653 (1981). These insurance cases demonstrate that where Congress has put in place a scheme which

not only renounces a federal interest, but also affirmatively advances state protectionism, this Court will find the states have been given an express grant of authority to enact statutes which otherwise would be deemed to contravene the Commerce Clause. In this case, the federal political process has already effectively preserved the states interest in regulating bank expansion. Cf. Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S.___, 53 L.W. 4135, 4142 (Feb. 19, 1985).("The political process ensures that laws that unduly burden the states will not be promulgated").

The cases of Sporhase v. Nebraska, 458 U.S. 941 (1982) and New England Power Co. v. New Hampshire, 455 U.S. 331 (1982), cited in petitioner Citicorp's brief at 19-20, also involve very dif-

ferent kinds of statutes. In Sporhase, a group of federal statutes saved state water rights statutes from pre-emption and also subjected disputes in federal projects concerning water rights to state laws, but did not allow the state to restrict the exportation of groundwater. New Hampshire Power Company also involved a provision by Congress saving state laws from pre-emption. In both cases this Court upheld state laws in the face of Commerce Clause challenges, yet the federal statutes authorizing state action fell far short of the comprehensive, affirmative preservation of state insularity established by the Douglas Amendment.

The decision in Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) supra, is even more directly on point.

It clearly supports the proposition that the Douglas Amendment constitutes a congressional authorization of state legislation that would otherwise violate the Commerce Clause. The Court in Lewis reviewed the Board's disaproval of an application for a New York bank holding company to engage in non-banking activities, in accordance with section 4 of the BHC Act, which unlike the Douglas Amendment, imposes no geographic restraints. The Douglas Amendment did not apply since the transactions in question involved the establishment of a non-banking subsidiary under section 4. But the Court made it clear that the Douglas Amendment imposed a general ban under federal law on interstate bank acquisitions and conferred upon the states

> the authority to create exceptions to this prohibition, that is, to permit expansion of banking across state lines where it would otherwise be federally prohibited.

Id at 47. Massachusetts has done precisely what Lewis contemplates by permitting bank expansion and creating an exception to the general federal ban.

B. The Massachusetts And Connecticut Acts Do Not Implicate The Fundamental Concerns Of The Commerce Clause.

The purpose of the Commerce Clause was to create free trade among the states. Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 370 (1976). The means of accomplishing this goal was investing Congress, not state legislatures and not the federal executive or judicial branches of government, with the ultimate authority to regulate

interstate trade. Thus, the Commerce Clause reflects the "necessity of centralized regulation of commerce among states" and "the principle that our economic unit is the Nation." H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 534-538 (1949). These fundamental premises simply have no application to the Massachusetts Act because Congress, not the states, established a decentralized banking scheme.

Congress, through the McFadden Act, the BHC Act, and the Douglas Amendment, has decreed that the principles of unrestricted trade among the states have no place in the banking industry. Further, while there exists some centralized regulation of banking, state interests and the protection of local banks remain the pre-eminent concerns in the area of

bank expansion through branch banking and interstate bank acquisitions. Congress divided the nation into state-contoured banking districts, thereby declaring the inapplicability of the very underpinnings of the Commerce Clause in the area of bank expansion.

The petitioners contend that the Connecticut and Massachusetts Acts reflect "local parochialism and protectionism" prohibited by the Commerce Clause. Northeast Bancorp brief, 15. Again, the petitioners cite wholly inapposite principles which, ironically, demonstrate how far removed the Massachusetts Act lies from a violation of the Commerce Clause.

To the extent that any statute involved in this case incorporates local parochialism and protectionism, that

statute is the Douglas Amendment. Congress has already established that notions of local parochialism and protectionism or, to use less perjorative language, decentralized and local self-government principles, will provide the framework for the structure of the banking industry. Massachusetts and Connecticut have actually chosen to display less local parochialism by diminishing the geographic discrimination embodied in the Douglas Amendment. Massachusetts has given up a very narrow, local protectionism for a broader form of regulation. The Massachusetts Act does not display local parochialism. Rather, it shows a cautious and reasonable expansion beyond the very boundaries of the local parochialism which Congress has imposed.

Further, the limited protectionism evidenced by the Massachusets Act does not differ, in principle, from many of the interstate bank acquisition statutes which incorporate other, non-geographic restrictions. Other states have conditioned interstate bank acquisitions on the existence of reciprocal statutes in other states, or on various financial conditions. For example, in Iowa Independent Bankers v. Board of Governors, 511 F.2d 1288 (D.C. Cir.) cert. denied, 423 U.S. 875 (1975), the court reviewed a case involving a challenge to an Iowa statute which permitted out-of-state bank holding companies to acquire Iowa banks if they owned at least two banks as of January 1, 1971. The statute effectively limited entry to all but one out-of-state bank holding company. The Court, while

considering an equal protection challenge, found that the state could reasonably enact a discriminatory statute which protected a bank with a pre-existing stake in the state's banking system. Other states, in furtherance of specific parochial interests such as the generation of local jobs, have limited entry by out-of-state bank holding companies to the establishment of special purpose banks, such as credit card banks, which are prohibited from or restricted in competing with in-state banks for customers. E.g., Del. Code Ann. tit. 5, §801 et seq. (Supp. 1984). The purported local parochialism of a Massachusetts Act which actually expands access to the Massachusetts banking industry demonstrates no more impermissible protectionism than a state which allows within its borders only non-competing financial entities.

In sum, it is worth reiterating in bold relief the basic premise of this section of argument: the Massachusetts and Connecticut Acts do not in any way burden or restrict interstate commerce. Those Acts allow an expansion of the banking industry in the New England region. Any restriction on interstate commerce results from the operation of the Douglas Amendment.[7/]

7/ It is important to note that all of the various state statutes enacted concerning interstate bank acquisitions expand interstate commerce only conditionally. The State of New York, as well as certain of its congressmen and its senators, have filed amici brief on behalf of the petitioners. The State of New York, however, can hardly argue that its statute, with its reciprocity provision, does not prevent certain interstate bank acquisitions and thereby impose a restriction on interstate commerce.

III. THE MASSACHUSETTS AND CONNECTICUT ACTS DO NOT VIOLATE THE COMPACT CLAUSE.

The Commonwealth's Compact Clause argument may also be simply stated. The Commonwealth has not entered into a compact with Connecticut merely by virtue of the enactment of the Massachusetts Act. Moreover since Congress has authorized the Massachusetts Act through the Douglas Amendment, the Massachusetts and Connecticut Acts have in no way encroached on federal authority.

The Compact Clause provides that "[n]o state shall...enter into any argument or compact with another state," without the consent of Congress. U.S. Const. Art. I, § 10, cl. 3. But only where an interstate agreement tends "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the

United States" does there exist an impermissible compact. Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

The Massachusetts Act went into effect in December, 1982, while the Connecticut Act was not enacted until June, 1983. Only when the Connecticut Act was passed did it become possible for Connecticut-based bank holding companies to acquire or merge with Massachusetts banks. The Commonwealth does not accept the proposition that an enactment of Connecticut invalidated a pre-existing Massachusetts statute.

Plainly put, no "New England Compact" exists. The petitioners' compact clause claim fails at the very threshold, first, because New England states have not enacted uniform laws. Massachusetts bank holding companies may now acquire banks in Rhode Island and Maine, but not in

New Hampshire or Vermont (neither of which have enacted a statute under the Douglas Amendment). Rhode Island has a statute which limits interstate bank acquisitions to the New England region only until June 30, 1986. After that date, Rhode Island's statute will authorize non-New England bank holding companies to purchase Rhode Island banking entities, so long as the acquiring company's home state affords reciprocal privileges to Rhode Island banking entities.[8/] Maine has a broader statute, allowing out-of-state bank holding companies to acquire Maine banking entities even in the absence of reciprocal privileges for Maine banks in the home states of the out-of-state bank holding companies. Massachusetts does not require

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8/ R.I. Gen. Laws §§19-30-1, 19-30-2.

that other New England states exclude bank holding companies located outside of New England. Thus, the acts cannot be viewed as a cohesive, coordinated attempt to isolate the New England banking region. Rather, Massachusetts and Connecticut have simply lifted the ban imposed by the Douglas Amendment, as to them, only to New England banks which will be relatively familiar organizations.

Nor can the petitioners make a showing that Massachusetts and Connecticut have established a mechanism for establishing any regional pact. Massachusetts and Connecticut have not created a third level of government between the federal and state levels.[9/]

9/ In United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452,

(footnote continued)

Even the most cursory reading of the relevant state laws reveals that Massachusetts and Connecticut have not established any independent multistate authority. Indeed, Massachusetts and Connecticut are actually giving up the authority to prevent certain bank holding companies from entering their borders, rather than

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(footnote continued)

471 (1978), 21 states had adopted legislation which established a "Multistate Tax Compact" for the purpose of equitably taxing businesses that generated taxable income in more than one state. The legislation established a commission composed of the tax administrators of the members states, and authorized the commission to undertake various studies, among other tasks. The Court rejected a challenge to the legislation under the Compact Clause, holding that it did not enhance state political powers nor encroach on federal supremacy. Id. at 472. The member states did not gain the ability to exercise any powers solely by virtue of the legislation, and the states did not delegate any power to the commission. Id. at 473.

gaining the ability to exercise any new powers. The Acts do not increase the authority of Massachusetts or Connecticut in any way, but rather merely expand the economic spheres of the states.

In short, the two Acts merely constitute independent, reciprocal actions by the states and, of course, reciprocal agreements, in and of themselves, do not violate the Compact Clause. Bode v. Barrett, 344 U.S. 583, 586 (1953).

Finally, the petitioners' arguments founder because the state laws at issue in no way interfere with any federal supremacy. Congress has already expressed its contentment with a nation divided into fifty units for banking purposes. Congress has also made clear that states have responsibility for establishing policy in the area of bank growth

through the regulation of branch banking and interstate banking. Since the Acts do precisely what Congress has contemplated--establish policy as to interstate bank acquisitions--without in any way constraining Congress, there is no in- trusion on federal supremacy.

CONCLUSION

For the reasons stated above, the Commonwealth of Massachusetts respectfully requests that the judgment of the court below be affirmed.

RESPECTFULLY SUBMITTED,
FRANCIS X. BELLOTTI,
ATTORNEY GENERAL

THOMAS R. KILEY
FIRST ASSISTANT
ATTORNEY GENERAL
COUNSEL OF RECORD

JAMIE W. KATZ
ASSISTANT ATTORNEY GENERAL
GOVERNMENT BUREAU
ONE ASHBURTON PLACE
BOSTON, MA 02108
(617) 727-1033

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No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL KIMMEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(d)) authorizes a state to permit the acquisition of banks within its borders only by bank holding companies located in certain regions in the United States.

2. Whether such geographically restrictive state banking statutes, enacted under the authority of Section 3(d) of the Bank Holding Company Act of 1956, violate the Commerce Clause or Compact Clause of the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A33) is reported at 740 F.2d 203. The three orders of the Federal Reserve Board at issue in this case (Pet. App. A34-A71, A72-A78 and A79-A87), which set forth its position, are reported at 70 Fed. Res. Bull. 374, 353 and 524.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1984. The petition for a writ of certiorari was filed on September 6, 1984, and was

granted on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Pet. App. A95-A102.

STATEMENT

1. Under the Bank Holding Company Act of 1956 (BHCA or Act) (12 U.S.C. 1841 *et seq.*), a bank holding company may not acquire a bank unless the transaction is approved by the Federal Reserve Board (Board). 12 U.S.C. 1842(a). Section 3(d) of the Act (12 U.S.C. 1842(d)) (the Douglas Amendment) generally bars the Board from approving the acquisition of a bank located in one state by a bank holding company that has its principal place of business in another state. But the Douglas Amendment empowers the Board to approve such interstate transactions in one circumstance: when "the acquisition of * * * a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." The Douglas Amendment therefore has the effect of permitting only those interstate banking acquisitions that are expressly authorized by the law of the state in which the target bank is located. See generally *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 46-47 (1980).

In late 1982, the Massachusetts legislature enacted a statute (Mass. Ann. Laws ch. 167A, § 2 (West 1971 & Supp. 1984), *reprinted* at Pet. App. A101-A102) (the Massachusetts Act) that permits the

acquisition of Massachusetts banks by out-of-state bank holding companies. The statute contains a significant limitation, however; it authorizes interstate acquisitions only if the acquiring bank holding company has its principal place of business in another New England state (that is, in Connecticut, Maine, New Hampshire, Rhode Island or Vermont).[1] On June 8, 1983, Connecticut enacted a similar statute (1983 Conn. Acts 83-411 (Reg. Sess.), *reprinted* at Pet. App. A97-A100) (the Connecticut Act), which authorizes the acquisition of Connecticut banks by holding companies based in the other five New England states.[2] The remaining New England states have taken a variety of approaches to interstate banking.[3]

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[1] The statute also contains a reciprocity provision, which permits the acquisition of Massachusetts banks by out-of-state holding companies only when the home state of the acquiring company grants reciprocal acquisition rights to Massachusetts bank holding companies.

[2] The Connecticut Act contains a reciprocity provision similar to the one found in the Massachusetts Act. It also provides that a New England bank holding company must divest itself of its Connecticut banks if the company acquires a bank, or is itself acquired by a bank holding company, that has its principal place of business in a state outside of New England.

[3] Rhode Island has enacted a statute that, like the Massachusetts Act, contains both regional restrictions and a reciprocity provision (1983 R.I. Pub. Laws S.0661, *reprinted at* Pet. App. A103-A106) : the Rhode Island regional restrictions, however, will expire on July 1, 1986. A Maine statute permits virtually unrestricted acquisitions of in-state banks by out-of-state holding companies. Me. Rev. Stat. Ann. tit. 9B, § 1013 (Supp. 1984). New Hampshire and Vermont have not lifted the Douglas Amendment's prohibition on interstate bank acquisitions.

2. Following the enactment of the Massachusetts and Connecticut Acts, three sets of Massachusetts and Connecticut bank holding companies agreed to merge.[4] These companies then applied to the Board for approval of the transactions. The applications were opposed by the petitioners in this case (see 12 U.S.C. 1850 and Pet. App. A38 n.6), New York and Connecticut bank holding companies and a Connecticut bank, which argued that the Massachusetts and Connecticut Acts authorizing the acquisitions violate the Commerce (Art. I, § 8, Cl. 3) and Compact (Art. I, § 10, Cl. 3) Clauses of the Constitution.[5]

Despite these objections, the Board approved the applications (Pet. App. A34-A71, A72-A78, A79-A86). Turning first to the statutory language, the Board found that, while the Douglas Amendment does not on its face refer to state authorization of interstate acquisitions by region (Pet. App. A65), the Massachusetts and Connecticut Acts nevertheless fall within the Amendment's literal terms by "meet-[ing] the requirement of express authorization for

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[4] Respondent Bank of New England Corporation, a Massachusetts bank holding company, agreed to merge with respondent CBT Corporation, a Connecticut bank holding company; respondent Hartford National Corporation, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, Inc., a Massachusetts bank holding company; and respondent Bank of Boston Corporation, a Massachusetts bank holding company, agreed to acquire Colonial Bancorp, Inc., a Connecticut bank holding company (Pet. App. 22).

[5] Separate applications were presented to the Board concerning each of the proposed transactions. Petitioner Citicorp challenged all three of the applications; the other petitioners challenged only the Bank of New England-CBT application. On appeal, the Second Circuit consolidated the three challenges (Pet. App. A26-A27).

interstate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act" (Pet. App. A37). The Board then concluded that "there is no clear and unequivocal basis for a determination" that the Acts are inconsistent with the Commerce Clause (Pet. App. A37, A74-A75, A83),[6] and rejected petitioners' Compact Clause claim on the ground that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52).[7]

The court of appeals upheld the Board's orders. The court reasoned that the Massachusetts and Connecticut Acts "specifically authorize acquisitions" of in-state banks by out-of-state holding companies and therefore are supported by the Douglas Amendment (Pet. App. A29). This conclusion disposed of petitioners' Commerce Clause argument, the court continued, because "Congress may authorize the states to enact statutes which may interfere with interstate commerce" (Pet. App. A30), and "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). The court found the state Acts consistent with the Compact Clause because the

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[6] The Board explained that it would not declare a state law inconsistent with the Constitution absent " 'clear and unequivocal evidence of the inconsistency.' " Pet. App. A40, quoting *NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982). See Pet. App. A74, A83.

[7] The Board also found that the acquisitions met the traditional competitive, financial and managerial standards set out in Section 3(c) of the BHCA (12 U.S.C. 1842(c)). See Pet. App. A41-A48, A75-A78, A80-A86. These determinations are not challenged here.

New England banking arrangement does not "encroach upon or interfere with the just supremacy of the United States" (Pet. App. A32).[8]

SUMMARY OF ARGUMENT

A. While state enactments affecting interstate banking must conform to the Commerce Clause, it is well-established that " 'Congress may confe[r] upon the States an ability to restrict the flow of commerce that they would not otherwise enjoy.' " *Western & Southern Life Ins. Co.* v. *Board of Equalization*, 451 U.S. 648, 652-653 (1981), quoting *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). The Douglas Amendment confers just such an ability upon the states, and therefore renders the state Acts at issue here "invulnerable to Commerce Clause challenge." *Western & Southern*, 451 U.S. at 653.

The Massachusetts and Connecticut Acts plainly are "statute laws" that "specifically authoriz[e]" the acquisition of "a State bank by an out-of-State bank holding company," and therefore are precisely the type of state enactment that is described—and constitutionally validated—by the Douglas Amendment. Because the Amendment affirmatively invites the states to involve themselves in the regulation of interstate commerce, it is not appropriate to search for exceptions to the delegated regulatory authority that do not appear in the language or legislative history of the Amendment. *Western & Southern*, 451 U.S. at 653.

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[8] The court of appeals also rejected a challenge to the Massachusetts and Connecticut Acts based on the Equal Protection Clause (Pet. App. A32-A33). That challenge is not repeated here.

Indeed, the Amendment's extraordinary structure, which "requires discrimination in interstate commerce, and then leaves it to the several states to correct it" (102 Cong. Rec. 6860 (1956) (remarks of Sen. Bennett)), demonstrates in an unusually clear and profound manner Congress's intention to "redefine the distribution of power over interstate commerce." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). In light of this statutory structure, petitioners' contention that the Douglas Amendment authorizes enactment only of state laws that otherwise would be valid under the Commerce Clause is insupportable: in the absence of the Amendment, there would not be—and could not be—any valid state law purporting to control the authorization of, or otherwise regulating, interstate bank acquisitions.

B. The legislative history of the Amendment supports the view that the breadth of the statutory language should be taken at face value. Congressional discussion of the BHCA was replete with references to the importance of the banking industry to states and localities. The Amendment itself expressly was structured to leave room for the exercise of "state policy" in "the expansion of bank holding companies across state lines" (*Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1297 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975)), while the comments of congressional proponents and opponents alike evinced a recognition that the Amendment would "alter the limits of state power otherwise imposed by the Commerce Clause." *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 304 (1953). Indeed, the state Acts at issue in the present case were in large part designed to further the very pur-

poses that inspired the enactment of the Amendment: both Acts were intended to increase competition in the banking industry, while ensuring that the owners of local financial institutions remained sensitive to "[t]he particular financial needs and problems of the community." 102 Cong. Rec. 6862 (1956) (statement of Sen. Payne).

C. That the Douglas Amendment authorizes enactments such as the state Acts at issue here is confirmed by the reading given the Amendment by the Board, the agency charged by Congress with "primary responsibility for administering the BHC[A]." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8. The Board held in this case, as it repeatedly has held in the past, that state statutes providing for only limited interstate banking suffice to provide the requisite state authorization under the Douglas Amendment—although virtually all of the statutes that were addressed in these decisions would run afoul of the Commerce Clause in the absence of congressional authorization. The Board has thus consistently rejected the contention, essentially repeated by petitioners here, that "Congress did not intend to allow state legislatures to choose selectively which out-of-state bank holding company could enter the state." *Northwest Bancorporation*, 38 Fed. Reg. 21530, 51531-21532 (1973). Accepting petitioners' contention that only state statutes that otherwise are valid under the Commerce Clause may be given force under the Douglas Amendment therefore would require rejection both of the Board's long-settled view and of a wide range of state statutes providing for interstate bank acquisitions.

D. The state Acts—even if we assume that they are "compacts"—do not fall within the meaning of

the Compact Clause because they neither "enhance[] state power *quoad* the National Government" nor disturb the "federal structure." *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 473, 478 (1978). The Massachusetts and Connecticut Acts can hardly encroach on specific federal banking concerns; Congress itself struck the balance between federal and state authority in the area of interstate bank acquisitions when it enacted the Douglas Amendment. And nothing in either Act works more broadly "to the detriment of federal supremacy" (*id.* at 460), creates any multistate governmental entity, or confers new or expanded political powers upon one or more states. Conversely, the state Acts do not bear at all upon the political "authority and power" of states outside of New England (*id.* at 494 (White, J., dissenting)).

ARGUMENT

THE MASSACHUSETTS AND CONNECTICUT ACTS ARE CONSISTENT WITH THE COMMERCE AND COMPACT CLAUSES OF THE CONSTITUTION

A. The Douglas Amendment Authorizes State Enactments Relating To Interstate Bank Acquisitions That Otherwise Would Be Inconsistent With The Commerce Clause

The constitutional principles that control the analysis of the Commerce Clause challenge in this case are well-established. In the absence of congressional authorization, there is little doubt that state enactments burdening interstate banking would run afoul of the Commerce Clause. See, *e.g.*, *Lewis*, 447 U.S. at 36; *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976). It is equally plain, however, that "Congress may 'confe[r] upon

the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *Western & Southern Life Ins. Co.* v. *State Board*, 451 U.S. 648, 652-653 (1981), quoting *Lewis*, 447 U.S. at 44. See *White* v. *Massachusetts Council of Construction Workers*, 460 U.S. 204, 213 (1983); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427-432 (1946).[9] The Douglas Amendment confers just such an ability upon the states, and therefore renders the Massachusetts and Connecticut Acts "invulnerable to Commerce Clause challenge." *Western & Southern*, 451 U.S. at 653.

1. a. The Douglas Amendment directs the Board to enforce—and therefore constitutionally validates—state laws that "specifically authoriz[e]" the acquisition of in-state banks by out-of-state bank holding companies. The state Acts at issue here are precisely the type of enactment that is described by the Amendment. Both plainly are "statute laws" that "specifically authoriz[e]" the acquisition of "a State bank by any out-of-State bank holding company" (12 U.S.C. 1842(d)), and both undoubtedly were intended to authorize the transactions challenged in this case. The Board and the court of appeals accordingly recognized that the Massachusetts and Connecticut Acts fall within the literal terms of the Douglas Amendment; the only other court that has addressed the language of the Amendment similarly found it "obvious" (*Iowa*

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[9] Two amici curiae hint that even Congress lacks the constitutional authority to approve regional banking arrangements. Amicus Curiae Chase Manhattan Corp. Br. 7-8 n.12; Amicus Curiae Bank of New York Co., Inc. Br. 18 & n.13. This point is not pressed by petitioners, however. In any event, the Court has explained that "[t]he only limitation [the Commerce Clause] places upon Congress' power is in respect to what constitutes commerce." *Benjamin*, 328 U.S. at 423.

Independent Bankers v. *Board of Governors*, 511 F.2d 1288, 1297 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975)) that "the Douglas Amendment empower[s] states to discriminate among out-of-state bank holding companies when deciding which [can] enter" (*Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), cert. denied, No. 83-954 (Apr. 2, 1984)).

Petitioners respond to the statutory language by suggesting that, while the Douglas Amendment undoubtedly permits the states to enact statutes "specifically authorizing" given types of interstate banking, the Massachusetts and Connecticut Acts nevertheless are invalid because the Amendment fails to declare with sufficient specificity that "such state laws [are] immune from the Commerce Clause" (Citicorp Br. 21).[10] Petitioners' underlying legal proposition undoubtedly is sound: it is of course true that "a state regulation [may] be removed from the reach of the dormant Commerce Clause" only when "congressional intent [is] unmistakably clear." *South-Central Timber Dev., Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 9. But the cases in which the Court has invalidated state enactments for want of the requisite congressional authorization have little bearing

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[10] In petitioners' view, the only state "statute laws" that may be promulgated pursuant to the Douglas Amendment are those that would be valid in the absence of authorizing federal legislation (see Citicorp Br. 21; Northeast Bancorp Br. 22). Given the virtually insurmountable burden borne by those who would defend protectionist economic legislation that overtly discriminates between in-state and out-of-state businesses (see, *e.g.*, *Lewis*, 447 U.S. at 36), however, in practice petitioners' position would leave states with essentially two choices: permitting full interstate banking, or permitting none at all.

here. Those cases involved state attempts to find federal authorization for restrictive conduct by looking to federal policy in analogous areas (*e.g.*, *South-Central Timber*, slip op. 6-10)[11] or by pointing to "standard 'non-pre-emption' clause[s]" in federal enactments (*e.g.*, *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 959-960 (1982)). See *Lewis*, 447 U.S. at 49. In such cases the Court has declined to "rewrite [congressional] legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power*, 455 U.S. at 343 (citation omitted).

The Douglas Amendment, in contrast, expressly invites the states to involve themselves in the regulation of interstate commerce by giving them an affirmative right to enact statutes authorizing specific interstate banking transactions. The literal text of the Amendment therefore empowers the states to adopt legislation authorizing transactions of the type described, such as the Acts at issue here, that might otherwise be open to Commerce Clause attack. When regulatory authority is conferred upon the states in such terms, it is inappropriate to search for exceptions that do not appear in "the language or history" of the statute

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[11] In *South-Central Timber*, Alaska tried to justify restrictions on the sale of timber from state lands by pointing to similar restrictions on the sale of timber from federal lands in the state. The Court concluded that "[t]he fact that state policy * * * appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands." Slip op. 10.

(*Western & Southern*, 451 U.S. at 653); "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

b. Moreover, petitioners' discussion of the Douglas Amendment's language wholly disregards the import of the extraordinary statutory structure. As Congress plainly recognized, it is the Douglas Amendment itself that "Balkanized" (102 Cong. Rec. 6861 (1956) (remarks of Sen. Bricker)) the nation's banking system by, in the first instance, prohibiting *all* interstate bank acquisitions. It is thus congressional rather than state action that actually works the restriction on commerce complained of by petitioners; even in the absence of the state Acts, out-of-state bank holding companies would be unable to consummate mergers or acquisitions in the New England market. And in sharp contrast to the type of state regulation usually challenged under the Commerce Clause, the state Acts at issue here actually "*permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis*, 447 U.S. at 47 (emphasis in original).[12]

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[12] Petitioners assuredly are incorrect in asserting that *Lewis* "establishes that the Douglas Amendment does not authorize discriminatory state legislation" (Citicorp. Br. 21; see Northeast Bancorp Br. 22-23) relating to in-state bank acquisitions by out-of-state holding companies. In *Lewis*, the Court rejected a claim that the Amendment validated state restrictions on the in-state nonbanking activities of out-of-state bank holding companies. The Court explained that the Amendment grants the states authority "to *permit* expansion of banking across state lines" (447 U.S. at 47 (emphasis in original)), but apparently does not authorize state restrictions "on bank holding company *activities*" (*ibid.*) (emphasis added). The Court added that, whatever the power of the states to regulate

By enacting the Douglas Amendment, Congress therefore exercised its "undoubted power to redefine the distribution of power over interstate commerce" (*Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)) in an unusually clear and profound manner. In these circumstances, it is particularly unpersuasive to suggest that Congress was obligated to detail the specific types of state enactments that the Amendment was intended to validate.[13]

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banking matters, the Douglas Amendment cannot be read to authorize state discrimination in the regulation of an out-of-state holding company's *nonbanking* activities. *Ibid.* Because the state Acts in the present case involve the regulation of bank acquisitions, rather than nonbanking activities, *Lewis* is not at all on point. Petitioners' attempt to find Section 7 of the BHCA (12 U.S.C. 1846) dispositive here is similarly flawed (Citicorp Br. 22; Northeast Bancorp Br. 22-23). As *Lewis* explained, that provision was designed simply "to define the extent of the federal legislation's pre-emptive effect on state law" (447 U.S. at 49) as it related to the in-state regulation of bank holding companies. Neither that provision, nor *Lewis*'s discussion of it, has any bearing on the authority of the states to provide for the entry of out-of-state bank holding companies pursuant to the Douglas Amendment.

[13] Indeed, the structure of the statute significantly reduces the force of the Commerce Clause policies relied upon by petitioners (see, *e.g.*, Citicorp Br. 16-17). The requirement that burdens on commerce clearly be authorized by Congress "ensures that there is * * * a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central Timber*, slip op. 9-10. Here, the actual burden on commerce—the restriction on interstate acquisitions—was unambiguously imposed by Congress itself. And there surely is less reason to insist upon explicit congressional discussion of the nature of the authorized state enactments when those enactments are *displacing* federally-imposed barriers to commerce.

The statutory structure also suggests in a more pointed way the fundamental distinction between the Douglas Amendment and federal legislation of the sort at issue in cases such as *Sporhase*. Federal nonpreemption clauses, like provisions providing that disputes involving federal projects are to be resolved by reference to state law (see, *e.g.*, *Sporhase*, 458 U.S. at 959-960), preserve or refer to existing state authority, and therefore necessarily "appl[y] only to state legislation that operates within the boundaries marked by the Commerce Clause." *Lewis*, 447 U.S. at 49. This is so, of course, because such federal legislation simply defers to otherwise "*valid* state law," in which "[t]he negative implications of the Commerce Clause * * * are ingredients." *Sporhase*, 458 U.S. at 960 (emphasis in original). Nothing in federal statutes of that sort involves the states as independent actors in a congressionally-adopted scheme for the regulation of interstate commerce. See *ibid.* Here, in contrast, the Douglas Amendment affirmatively grants the states the ability to authorize certain interstate transactions. Indeed, the concept of otherwise "valid state law" simply has no application in this case: in the absence of the Douglas Amendment, there would not be—and could not be—any valid state law purporting to control the authorization of, or otherwise regulating, interstate bank acquisitions.[14]

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[14] Given these clear indications that "Congress affirmatively contemplat[ed] otherwise invalid state legislation" (*South-Central Timber*, slip op. 9), the omission of the term "interstate commerce" from the Douglas Amendment is not significant. There is no "talismanic significance" to any particular statutory formula in this area, so long as the congressional intent is "unmistakably clear" (*ibid.*).

2. a. While the legislative history of the Douglas Amendment is not extensive [15] and does not address in detail the nature of the state enactments authorized, the statutory background supports the view that the breadth of the Amendment's language should be taken at face value. As an historical matter, "banking and related financial activities [have been] of profound local concern" (*Lewis*, 447 U.S. at 38). It is therefore not surprising that the legislative history of the BHCA is replete with references to the importance of the banking industry to states and localities. See, *e.g.*, H.R. Rep. 609, 84th Cong., 1st Sess. 2 (1955); 101 Cong. Rec. 8028 (1955) (remarks of Rep. Patman); *id.* at 8030-8031 (remarks of Rep. Rains); *id.* at 8033 (remarks of Rep. O'Hara); *id.* at 8034 (remarks of Rep. Marshall); 102 Cong. Rec. 6752, 6755 (1956) (remarks of Sen. Robertson); *id.* at 6757-6758 (remarks of Sen. Douglas); *id.* at 6862 (remarks of Sen. Payne); *ibid.* (remarks of Sen. Morse).

Congressional discussion of the Douglas Amendment reflected this respect for "state policy" in the Amendment's particular focus on "the expansion of bank holding companies across state lines." *Iowa Independent Bankers*, 511 F.2d at 1297. The Amendment itself strikes a middle ground between the provision proposed by the House (H.R. 6227, 84th Cong., 1st Sess. § 5(c) (1955)), which would have barred all interstate bank acquisitions without exception, and the initial Senate bill, which would have left it to the Board to approve or disapprove specific interstate transactions (see 102 Cong. Rec. 6752 (1956) (re-

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[15] Because the Amendment was adopted on the Senate floor (see 102 Cong. Rec. 6856-6863 (1956)) its meaning is not addressed in a committee report.

marks of Sen. Robertson)). In its present form, the Amendment therefore is structured to give the greatest deference to state "discretion" (*id.* at 6862 (remarks of Sen. Payne)). The Amendment draws its language—as well as its guiding principle—from the McFadden Act (12 U.S.C. 36(c)), which bars national banks from branching across state lines and permits such banks to branch *within* a state only to the degree permitted state banks by the "statute laws of the State in question." See generally 102 Cong. Rec. 6858, 6860 (1956) (remarks of Sen. Douglas). When the Douglas Amendment was debated, the McFadden Act was perceived as preventing national banks from "expand[ing] across state lines in a way contrary to State policy and * * * even to expand within a State [in such a way]." *Id.* at 6860 (remarks of Sen. Douglas). See generally *First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979).

The statements by the Douglas Amendment's sponsors consistently hewed to this deferential approach. Senator Douglas explained that his Amendment "permit[s] out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them" (102 Cong. Rec. 6858 (1956)), thus preventing "expan[sion] of bank holding companies] across state lines in a way contrary to State policy" (*id.* at 6860). Other sponsors noted that the Amendment furthered "States [*sic*] rights" (*id.* at 6862 (remarks of Sen. Morse; see also *id.* at 6860 (remarks of Sen. Douglas)), or supported the provision because they believed that the interstate expansion of bank holding companies "is an area best left to [the states'] discretion" (*id.* at 6862 (remarks of Sen. Payne)). Conversely, detractors of the

Amendment properly noted that the provision's "strange approach" turned on its head the usual state of affairs in the regulation of interstate commerce, by "requir[ing] discrimination in interstate commerce, and then leav[ing] it to the several States to correct it" (*id.* at 6860 (remarks of Sen. Bennett)). See *id.* at 6861 (remarks of Sen. Bricker) (Douglas Amendment "forces States to take legislative action to protect themselves").

This background certainly reveals a realization on Congress's part that the Douglas Amendment allows the states to involve themselves in the regulation of interstate commerce in a very unusual way, in terms that do not restrict the nature of the permitted regulation.[16] It necessarily follows that Congress " 'evinc[ed] a[n] * * * intent "to alter the limits of state power otherwise imposed by the Commerce Clause." ' " *South-Central Timber*, slip op. 8, quoting *New England Power*, 455 U.S. at 341, in turn quoting *United States* v. *Public Utilities Comm'n*, 345 U.S. at 304.

b. Moreover, the particular state Acts at issue in the present case were in large part designed to further the very purposes recognized as legitimate by—and that in fact inspired the enactment of—the

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[16] Petitioner Citicorp reads the legislative history to stand for the proposition that Congress wished "to avoid regional discrimination" (Citicorp Br. 25). In support of this assertion, however, petitioner cites legislative comments directed not at the Douglas Amendment, but at unrelated regulatory aspects of the BHCA (see Citicorp Br. 25 n.18, citing 101 Cong. Rec. 8180-8181, 8184 (1955)). Petitioner also cites statements made in debate on the Amendment by Senator Bricker—but he urged rejection of the proposal because the federal restrictions *themselves* balkanized the banking industry. See 102 Cong. Rec. 6861 (1956).

Douglas Amendment. The legislative commission that recommended adoption of the Connecticut Act, for example, acknowledged that interstate banking would have the beneficial effect of "increasing the number of competitors and the vigor of banking competition in the state." Connecticut Br. in Opp. App. 4a. At the same time, however, the commission cautioned that "[t]he promotion of local ownership and control of banks has as one of its objectives the preservation of a close relationship between those in our communities who need credit and those who provide credit," so that "allow[ing] the control of credit that is essential to the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and businesses would not * * * serve [the] state well." *Id.* at 5a. Similarly, the Commission warned against exposing smaller banks to "the rigors of unlimited competition." *Ibid.* Allowing interstate banking on a regional basis, the commission concluded, would serve to increase competition and strengthen local financial institutions; it also would ensure that banks in Connecticut remained sensitive to local concerns, because "there is a community of interest among the New England states." *Id.* at 6a.

It appears that the regional restrictions in the Massachusetts Act were prompted by similar considerations—in particular, by a belief that Massachusetts might best achieve both increased banking competition and continued close ties between the banking industry and the community by allowing expansion on the part of "banking institutions within this region [that] had a tradition and a concern for the stability and the vitality and the economic health of this region." Pet. App. A155 (statement of Mass. State Sen. Brennan). The New England restriction was

a sensible one, the sponsor of the Massachusetts Act added, because "history shows [that in New England] there are six states only by accident and there really should have been one big state." *Id.* at A188. By contrast, the acquisition of New England banks by holding companies headquartered outside of the region, which inevitably would follow from an immediate, blanket lifting of the Douglas Amendment's restrictions (see, *e.g.*, Pet. App. A160, A189), was seen as a threat to the independence of local banking institutions.

Plainly, the state Acts at issue here were designed to provide consumers of banking services with the benefits of increased competition, while at the same time strengthening and preserving local financial institutions. But it is equally plain that legislation motivated by such considerations fully accords with the congressional desire to preserve a banking system in which banks are "owned and managed by citizens of the community in which [they] operat[e]" and therefore are familiar with and sensitive to "[t]he particular financial needs and problems of the community." 102 Cong. Rec. 6862 (1956) (statement of Sen. Payne). Cf. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 363-364 (1970) (local bank had extended to small borrowers in the community numerous "unsecured loans on the basis of character").

3. That the Douglas Amendment authorizes enactments such as the state Acts at issue here is confirmed by the reading given the Amendment by the Board, the agency charged by Congress with "primary responsibility for administering the BHC[A]." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8. Here, of course,

the Board concluded as a statutory matter that the Massachusetts and Connecticut Acts are the type of state legislation that the Douglas Amendment empowers it to enforce, because those Acts are "statute laws" of the sort expressly described in the Amendment. See Pet. App. A37.

The conclusion that the Douglas Amendment was intended to validate transactions consummated under the authority of restrictive state statutes is consistent with the Board's longstanding approach. Since 1972, at least 14 states (in addition to the states that have acted to permit regional bank acquisitions [17]) have enacted statutes that permit interstate banking on a limited basis. See nn. 18-21, *infra*.[18] Among other things, these statutes allow interstate acquisitions only by companies based in states that have enacted reciprocity provisions,[19] impose conditions expressly designed to limit severely the ability of authorized out-of-state institutions to compete with domestic banks,[20] and otherwise lift the Douglas Amendment's

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[17] It appears that six states in addition to Massachusetts, Connecticut and Rhode Island have enacted statutes permitting interstate bank acquisitions on a regional basis. See Fla. Stat. Ann. § 658.295 (West 1984); Ga. Code § 7-1-621; Ky. Rev. Stat. Ann. § 287.900 (Bobbs-Merrill Supp. 1984); N.C. Gen. Stat. § 53-209 *et seq.* (Supp. 1984); S.C. Code Ann. (to be codified at) § 34-24-70; Utah Code Ann. §§ 7-1-102, 7-1-702 (Supp. 1984).

to be Codified at

[18] Only Maine permits essentially unlimited entry by out-of-state holding companies. Me. Rev. Stat. Ann. tit. 9B, § 1013 (West Supp. 1984).

[19] N.Y. Banking Law § 142-b (McKinney 1984). When the regional restrictions in the Rhode Island statute lapse on July 1, 1986, that state's statute also will impose a simple reciprocity requirement (1983 R.I. Gen. Laws § 19-30-2(a)(1), *reprinted at* Pet. App. A105).

[20] The Delaware statute, for example, permits out-of-state holding companies to acquire only one in-state bank, which,

blanket prohibition in very limited ways.[21] Virtually all of these provisions would run afoul of the Commerce Clause in the absence of congressional authorization.[22] Yet the Board repeatedly has approved in-

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among other things, must be "operated in a manner and at a location that is not likely to attract customers from the general public in [Delaware] to the substantial detriment of existing banking institutions located in [the] state." Del. Code Ann. tit. 5, § 803(4) (Supp. 1984). Similarly restrictive "special purpose" statutes are found at Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1984); Neb. Rev. Stat. §§ 8-1511 to 8-1513 (Supp. 1984); Nev. Rev. Stat. (to be codified at) § 666.065; S.D. Codified Laws Ann. § 51-16-40 (Supp. 1984); Va. Code § 6.1-392 (1983).

[21] Several states have grandfather provisions that permit in-state acquisitions only by out-of-state holding companies that owned banks in-state prior to a certain date. Fla. Stat. Ann. § 658.29 (West 1984); Ill. Ann. Stat. ch. 17, §§ 2510, 2710 (Smith-Hurd 1981); Iowa Code Ann. § 524.1805 (West Supp. 1984-1985). Other states permit out-of-state bank holding companies to acquire only failing banks. Minn. Stat. Ann. § 49.48 (West Supp. 1985); 1983 Or. Laws ch. 367 (to be codified); Wash. Rev. Code § 30.04.230(a) (1984). Alaska permits the acquisition by out-of-state holding companies of existing in-state banks formed after a certain date. Alaska Stat. § 06.05.235 (Supp. 1983).

[22] Reciprocity requirements such as those in the New York and Rhode Island statutes (see n.19, *supra*) are, in the absence of congressional authorization, unconstitutional in virtually all circumstances; states may not use "the threat of economic isolation as a weapon" with which to obtain reciprocal action from sister states. *Cottrell*, 424 U.S. at 379; see generally *id.* at 370-381; *Sporhase*, 458 U.S. at 957-958. Statutes such as the one found in Delaware (see n.20, *supra*), which for overtly protectionist reasons limit the in-state activies permitted to out-of-state companies, are equally suspect. See, *e.g.*, *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539-540 (1949). Indeed, all of the state statutes in this area would appear to be per se unconstitutional (absent congres-

terstate transactions consummated under these statutes, in the process finding such laws "sufficient for purposes of satisfying the Douglas Amendment." *NCNB Corp.*, 68 Fed. Res. Bull. 54, 59 (1982). See *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983) (involving Illinois law); *BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983) (Washington law); *Citicorp*, 68 Fed. Res. Bull. 499 (1982) (Delaware law); *Provident National Corp.*, 68 Fed. Res. Bull. 194 (1982) (Delaware law); *NCNB Corp.*, 68 Fed. Res. Bull. at 59; *Northwest Bancorporation*, 38 Fed. Reg. 21530 (1973) (Iowa law). Indeed, the Board scrutinized the individual transactions before approving them to ensure that they conformed with the restrictions imposed by state law. See *General Bancshares*, 69 Fed. Res. Bull. at 802; *BankAmerica*, 69 Fed. Res. Bull. at 569; *Citicorp*, 68 Fed. Res. Bull. at 499, 500; *Provident National*, *supra*.

In reaching its conclusions in the present case, the Board noted that its prior decisions were grounded on the belief "that the states have full discretion to

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sional authorization) because they are economic regulations that explicitly accord different treatment to in-state and out-of-state companies, and plainly do not "visi[t] [their] effects equally upon both interstate and local businesses." *Lewis*, 447 U.S. at 36. See *id.* at 42-44. These statutes certainly would be unconstitutional under petitioners' theory, because they are grounded on a conscious decision to exclude certain forms of commerce from the enacting state (see Citicorp Br. 36). While petitioners maintain that regional restrictions are particularly offensive to the Commerce Clause (see *ibid.*), this Court never has suggested that overtly protectionist measures that offer disparate treatment to in-state and out-of-state companies are entitled to an extra measure of Commerce Clause protection when they benefit the residents only of one, rather than of several, states.

set the terms of entry of out-of-state bank holding companies" (Pet. App. A71). Indeed, the Board has "consistently construed the Douglas Amendment to authorize the states to limit or to restrict entry by out-of-state bank holding companies." *Bank of New York*, 70 Fed. Res. Bull. 527, 528 (1984). The Board has thus flatly rejected the contention, essentially repeated by petitioners here (see n.10, *supra*), that "Congress did not intend to allow state legislatures to choose selectively which out-of-State bank holding company could enter the State." *Northwest Bancorporation*, 38 Fed. Reg. at 21531-21532.[23]

As petitioners note (Citicorp Br. 8-9; Northwest Bancorp Br. 8), the Board in this case frankly acknowledged its lack of expertise in resolving constitutional issues. But it is not the Board's constitutional analysis that is due respect; it is the Board's views on the meaning of the BHCA that are entitled to the "greatest deference" (*Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 (1981)). Here, the Board's familiarity with the statutory language and the congressional purposes

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[23] Amicus Curiae Bank of New York offers a novel argument on a related point. It maintains that once a state permits the acquisition of any in-state bank by any out-of-state holding company, under the terms of the Douglas Amendment the state action must be interpreted as lifting the federal prohibition as to *all* such transactions. Br. of Amicus Curiae Bank of New York Co., Inc. 7-10. If accepted, this interpretation would mean that states seeking to permit only very limited interstate banking would find themselves to have inadvertently authorized full interstate banking. Such a reading of the Amendment has been flatly rejected by the Board (*Bank of New York*, 70 Fed. Res. Bull. 527 (1984)) and the courts (*Iowa Independent Bankers*, 511 F.2d at 1296), and cannot be squared with the principle of deference to state policy articulated by the drafters of the Douglas Amendment.

led it to conclude both that the Douglas Amendment is, in a general sense, "a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52), and that even discriminatory state statutes fall within the literal terms of the Amendment. Accepting petitioners' contention that only state statutes that otherwise are valid under the Commerce Clause may be given force under the Douglas Amendment therefore would require rejection both of the Board's long-settled view and of the many typical (and to this point noncontroversial) state approaches to interstate bank acquisitions that we have described (pp. 21-22, *supra*).[24]

B. The Massachusetts and Connecticut Acts Do Not Constitute A Compact That Must Be Approved By Congress

This Court repeatedly has held that "the 'application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to the increase of the political power in the States, which may encroach upon or interfere with the just supremacy of the United States." ' " *United States Steel Corp* v. *Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978), quoting *New Hampshire* v. *Maine*,

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[24] As petitioners note (Citicorp Br. 37-38), the Board expressed the view that such statutes impose "substantially less of a burden on commerce" than do regional arrangements (Pet. App. A71; see *Citicorp*, 71 Fed. Res. Bull. 101, 103 (1984)). But the Board nevertheless recognized that the statutes "obviously result in some burden on interstate commerce" (Pet. App. A71), and that their validity would be called into question if the Massachusetts and Connecticut Acts were invalidated (*ibid.*). This view undoubtedly is correct. See n.22, *supra*.

426 U.S. 363, 369 (1976), in turn quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). Thus, as construed by this Court, the Clause is directed at joint state action that threatens to interfere with the federal government's activities, or that might disturb the "federal structure" (*Multistate Tax Comm'n*, 434 U.S. at 478) by displacing traditional federal and state decision-making mechanisms. "[T]he test" of whether an agreement between states requires congressional approval, then, "is whether the Compact enhances state power *quoad* the National Government." *Id.* at 473. The New England Acts—even if we assume that they otherwise are "compacts"—do not satisfy that test.

1. It is of course true, as petitioners note (Citicorp Br. 45), that the federal government has a general interest in the integrity of the nation's banking system. But that is only the beginning of the inquiry, for "every state cooperative action touching interstate or foreign commerce implicates some federal interest." *Multistate Tax Comm'n*, 434 U.S. at 480 n.33. Such cooperative action also implicates the Compact Clause only when, in addition, the challenged agreement presents "a threat of encroachment or interference" with federal prerogatives "through enhanced state power." *Ibid.*

The state Acts at issue here present no such threat. It is Congress itself that struck the balance between federal and state authority in the area of interstate bank acquisitions when it enacted the Douglas Amendment, which, as the Board noted, amounts to "a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52). Statutes enacted under the authority of the Amendment therefore can hardly

interfere "with the full and free exercise of federal authority." *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). And the Acts do not raise even a potential threat to federal regulatory interests: they do not create a multi-state regulatory system to rival the Board, or establish any sort of administrative mechanism. Bank acquisitions in each New England state currently proceed, as before, under the dual supervision of that state's regulatory authority and of the Board.

Petitioners nevertheless contend that the Connecticut Act threatens to disrupt the operation of 12 U.S.C. 1823(f) and 1842(d), which in limited circumstances permit the Federal Deposit Insurance Corporation to arrange for the interstate acquisition of failing banks. The Connecticut Act requires New England-based holding companies to divest themselves of their Connecticut banks if they acquire banks outside of New England (Pet. App. A99), and petitioners therefore claim (Citicorp Br. 46; Northeast Bancorp Br. 37) that the Act will discourage such holding companies from attempting to acquire failing banks outside of the region. The divestiture requirement does not appear in the Massachusetts Act, however, and therefore cannot represent joint action of the sort that might implicate the Compact Clause. To the extent that the Connecticut Act is inconsistent with the congressional scheme, it is simply preempted by federal law. See, *e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).[25]

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[25] Petitioner Northeast Bancorp asserts that both state Acts conflict with the failing bank provisions by "prohibit[ing] Massachusetts and Connecticut banks and bank holding companies from acquiring non-New England banks" (Northeast

2. While the state Acts thus do not encroach on specific federal banking concerns, petitioners further contend that the New England arrangement more broadly threatens the national government's interest in safeguarding the integrity of the federal structure. It does so, petitioners maintain, because through the state Acts Massachusetts and Connecticut are "increasing their power at the expense of sister states and thereby undermining the Union" (Citicorp Br. 42; Northeast Bancorp Br. 33-34). This contention both misstates the nature of the interests implicated by the Compact Clause and, like petitioners' Commerce Clause claim, disregards the import of the statutory scheme established by the Douglas Amendment.

Even if we assume that the state Acts were the product of joint action, nothing in either Act, or in both together, works "to the detriment of federal supremacy." *Multistate Tax Comm'n*, 434 U.S. at 460. To the contrary, the state Acts simply make use of authority specifically delegated by Congress in

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Bancorp Br. 37; see also Citicorp Br. 46, making same assertion as to Connecticut Act). In fact, neither Act in terms establishes such a prohibition. And even if the Acts could be interpreted as creating such a bar, it is far from clear that this is the type of interference with federal interests that would call the Compact Clause into play. As noted below, the state Acts have no effect on the "federal structure" (*Multistate Tax Comm'n*, 434 U.S. at 478), do not displace traditional state and federal decision-making roles, and do not have implications for "federal supremacy" (*id.* at 471). To the extent that the state Acts simply are inconsistent with federal law, both already have been preempted by 12 U.S.C. 1823(f)(4)(i), which provides that the identified failing bank acquisitions may occur "[n]otwithstanding [the Douglas Amendment] or any other provision of law, State or Federal."

permitting the consummation of certain types of private transactions. Legislation of this sort hardly involves action taken in a "concerted fashion to foreclose federal law" (*id.* at 491 (White, J., dissenting)), and does not in any other way detract from federal authority.

Conversely, the state Acts in no way confer upon the states, either singly or as a group, new or expanded political powers. As noted above, the Acts do not create a multi-state regulatory entity that is empowered to bind or demand action from the New England states, or that may undertake initiatives on its own (cf. *Multistate Tax Comm'n*, 434 U.S. at 492 (White, J., dissenting)); as a result (despite petitioners' suggestion to the contrary, see Citicorp Br. 45-46), the Acts " 'neither project a new presence onto the federal system nor alter any state's basic sphere of authority.' " *Multistate Tax Comm'n*, 434 U.S. at 469 n.21, quoting Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976). And the Acts do not "purport to authorize the [New England states] to exercise any powers they could not exercise" in the absence of the state legislation. *Multistate Tax Comm'n*, 434 U.S. at 473. It therefore is difficult to see how such enactments "impermissibly enhance state power." *Id.* at 472.[26]

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[26] The state Acts at issue here have considerably less of an impact on the federal structure than does the Multistate Tax Commission, the validity of which was settled in *Multistate Tax Comm'n*. Like the Tax Compact, the New England arrangement does not "authorize the member States to exercise any powers they would not exercise in its absence," does not "delegate sovereign power" to a multi-state entity, and leaves

Finally, it is inaccurate to assert that the New England arrangement "benefits New England states *at the expense of all other states*" (Citicorp Br. 41-42 (emphasis added)). The state Acts, which authorize certain private transactions, do not work to the *political* disadvantage of states outside of New England; indeed, petitioners have failed to explain how the Acts bear at all upon the "authority and power" of such states.[27] *Multistate Tax Comm'n*, 434

"each State * * * free to withdraw at any time." *Multistate Tax Comm'n*, 434 U.S. at 473. Similarly, each New England state would be free to act on its own to permit in-state acquisitions only by New England holding companies, even in the absence of regional provisions in other state statutes; indeed, holding companies based in Maine—which permits essentially unlimited entry by out-of-state holding companies (see n.18, *supra*), and therefore satisfies the reciprocity requirements of the Massachusetts and Connecticut Acts—may acquire banks in Connecticut and Massachusetts. Cf. *Multistate Tax Comm'n*, 434 U.S. at 474-475. Unlike the Tax Compact, however, the New England arrangement is not marked by an articulated history of hostility to federal interests (cf. *id.* at 487-489 (White, J., dissenting)); is not designed to, and by its nature cannot, foreclose federal activity in the area (cf. *id.* at 491 (White, J., dissenting)); does not create an entity with an independent existence (cf. *id.* at 492 (White, J., dissenting)); imposes no requirements or constraints upon member states (cf. *ibid.*); and did not depend upon joint action to go into effect (cf. *id.* at 493 (White, J., dissenting)).

[27] Claims of competitive injury suffered by companies based in states outside of New England do not raise issues under the Compact Clause. As the Court noted in *Multistate Tax Comm'n*, 434 U.S. at 478, "it is not clear how our federal structure is implicated" by the economic effects of state action that does not "transgres[s] the bounds of the Commerce Clause." The state Acts, of course, are consistent with the Commerce Clause because authorized by the Douglas Amendment. See pp. 9-25, *supra*.

U.S. at 494 (White, J., dissenting). Moreover, to the extent that any states are disadvantaged by current restrictions on interstate banking, the injury flows from the Douglas Amendment itself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL KIMMEL
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY AND CITICORP,

Petitioners,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FLEET FINANCIAL GROUP, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' POSITION

Of Counsel:
EDWARD W. DENCE, JR.
WILLIAM C. MUTTERPERL

WILLIAM G. DELANA
ALLAN B. TAYLOR
J. BRUCE BOISTURE*
ROBERT M. TAYLOR, III
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
Counsel for *Amicus Curiae*
Fleet Financial Group, Inc.

**Counsel of Record*

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No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY AND CITICORP,

Petitioners,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FLEET FINANCIAL GROUP, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' POSITION

INTEREST OF *AMICUS CURIAE*

Fleet Financial Group, Inc. ("Fleet") is a bank holding company registered under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"). Its principal subsidiary is Fleet National Bank, a national banking association with its principal place of business in Providence, Rhode Island. On October 4, 1984, the Board of

Governors of the Federal Reserve System (the "Board") approved Fleet's application, pursuant to the BHC Act, to acquire two newly chartered national banking associations, one located in Hartford, Connecticut, and the other in Boston, Massachusetts. *Fleet Financial Group, Inc.*, 70 Fed. Res. Bull. 881 (1984).

Fleet's acquisition of these two banks was approved by the Board based on the two state statutes challenged in this case, "An Act Concerning Interstate Banking," 1983 Conn. Acts 411 (the "Connecticut Act") and Mass. Gen. Laws Ann. ch. 167A (West Supp. 1984) (the "Massachusetts Act").[1] Citicorp, a petitioner in this case, sought review of the Board's approval of Fleet's application in the United States Court of Appeals for the Second Circuit. The Court of Appeals, based on its earlier decision in the present case, sustained the Board's order approving Fleet's application.

Citicorp thereupon petitioned this Court for review of the decision of the Court of Appeals. *See* Petition for Writ of Certiorari in No. 84-754, to which the order of the Court of Appeals is appended as Appendix B. This Court has not yet acted on the Petition in No. 84-754.

Fleet's interest as an *amicus curiae* in this case is obvious and immediate. Only if the Connecticut and Massachusetts Acts are sustained against the challenge mounted by Petitioners in this case will Fleet be able to complete its proposed acquisition of the two new banks in Hartford and Boston.

All of the parties to this case have consented in writing to the filing of this brief and their consents have been filed along with the brief.

SUMMARY OF ARGUMENT

1. *The Douglas Amendment.* Congress, in enacting the Douglas Amendment in 1956, prohibited bank holding companies from acquiring banks located outside of their respective home states. In doing so, Congress followed its longstanding approach to the regulation of the geographic structure of the banking industry in the United States, favoring local markets and local regulation and control.

[1]The Connecticut Act was amended by 1984 Conn. Acts 329, and is codified at Section 36-552 *et seq.* of the General Statutes of Connecticut.

Indeed, in furtherance of the policy of local regulation and control, Congress granted to the states in the Douglas Amendment the authority to permit interstate bank acquisitions by bank holding companies that otherwise would be prohibited by the Douglas Amendment. The Connecticut and Massachusetts Acts are squarely within this authority granted to the states by Congress and therefore do not violate the Commerce Clause.

The language of the Douglas Amendment does not include any exceptions to or restrictions on the authority it confers upon the states, and the legislative history of the Douglas Amendment supports the conclusion that Congress meant to grant to the states its full regulatory authority under the Commerce Clause. In particular, neither the language nor the legislative history of the Douglas Amendment indicates that the states lack the authority to adopt a limited approach to bank holding company expansion such as that found in the Connecticut and Massachusetts Acts. In view of the localism and market segmentation reflected in the Douglas Amendment's general prohibition on interstate bank acquisitions by bank holding companies, it is hardly surprising to find that Congress granted to the states an unqualified authority that could be used by the states only to create less confined and more extensive banking markets.

The ability of the states to permit entry of out-of-state bank holding companies on a limited basis pursuant to the Douglas Amendment consistently has been recognized and approved in past judicial and administrative decisions. These limited entry statutes have taken the form of grandfather statutes (discriminating against some out-of-state bank holding companies), limited purpose entry statutes (discriminating against the permissible activities of all out-of-state bank holding companies), reciprocal statutes (discriminating against some out-of-state bank holding companies), and regional statutes (discriminating against some out-of-state bank holding companies). All of these types of statutes consistently have been upheld as valid exercises of state authority under the Douglas Amendment.

Petitioners mistakenly rely on the cases of this Court that have outlined and applied to state laws the negative implications of the Commerce Clause. As the decisions of this

Court make clear, once Congress acts to regulate or restrict commerce, or to grant to the states the authority to regulate or restrict commerce, the negative implications of the Commerce Clause are inapplicable to actions taken by Congress, or taken by the states within the scope of such authority. Because the Connecticut and Massachusetts Acts were adopted pursuant to the authority granted to the states in the Douglas Amendment, they are immune from the Commerce Clause challenge mounted against them by Petitioners.

2. *The Compact Clause.* The Connecticut and Massachusetts Acts are independently enacted state statutes evidencing a legitimate exercise by each state of the authority granted to it through the Douglas Amendment. Such independent exercises of specifically granted congressional authority do not give rise to a compact between the states for purposes of the Compact Clause.

Even if an agreement or compact were somehow deemed to exist, the Connecticut and Massachusetts Acts are nevertheless permissible under settled Compact Clause doctrine. Not all agreements or compacts between or among states are prohibited by the Compact Clause. Rather, only those agreements or compacts that increase the political power of the states or encroach upon or interfere with the just supremacy of the United States are prohibited without congressional consent. *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 471 (1978). Thus, leaving aside the fact that Congress has consented to the Connecticut and Massachusetts Acts through the authority it granted to the states in the Douglas Amendment, those Acts do not offend the Compact Clause because they neither increase the political power or influence of the states nor encroach upon the supremacy of the United States.

ARGUMENT

I. The Douglas Amendment Authorizes The Connecticut And Massachusetts Acts

Petitioners' entire argument, in a nutshell, is that it is impossible to suppose that Congress would have granted to

the states the authority to permit interstate bank holding company expansion on the regional, reciprocal basis found in the Connecticut and Massachusetts Acts. In the midst of their alarmist statements about compacts, confederacies, and threats to the Union, however, Petitioners fail to take account of the legitimate localism that has shaped congressional regulation of the structure of the banking industry for one hundred and fifty years.

When the charter of the Second Bank of the United States expired in 1836, attempts to construct a national banking system structured by federal law ended with it. Since that time, the banking industry has developed on a local basis, with Congress recognizing and deferring to the authority of the states to shape the geographic structure of the industry. The enactment of the Douglas Amendment in 1956 merely continued this pattern of regulation, in the then-novel context of bank holding companies, by authorizing the states to determine if and to what extent interstate expansion of bank holding companies would be permissible. The Connecticut and Massachusetts Acts are within the scope of this authorization and therefore are protected from the unfounded Commerce Clause attack mounted by Citicorp and the other Petitioners.

A. The Douglas Amendment Evidences Continued Congressional Deference To The Legitimate Localism That Has Shaped The Structure of the Banking Industry In the United States

The Douglas Amendment generally restricts each bank holding company to the acquisition of banks in only one state.[2] The bank holding company legislation originally proposed by the Senate Banking Committee in 1956, S. 2577, contained no such restriction. S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955). But H.R. 6227, a comparable legislative proposal

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[2]The Douglas Amendment, enacted as ch. 240, § 3 (d), 70 Stat. 134 (1956) and codified at 12 U.S.C. § 1842(d), provides, in relevant part, that:

> Notwithstanding any other provision of this section, no application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any

for the regulation of bank holding companies, specifically limited bank holding companies to the ownership of banks in a single state. H.R. Rep. No. 609, 84th Cong., 1st Sess. 14-15 (1955). The effect of Senator Douglas' amendment to S. 2577 was to bring the Senate bill more into line with the House bill on this point, establishing a basic pattern of state-by-state organization of the bank holding company system. This proposal was subsequently adopted as part of the BHC Act.

This was not a novel approach for Congress in shaping the structure of the banking industry. Since 1836, when the charter of the Second Bank of the United States expired, Congress has consistently deferred to the states in the regulation of the geographic structure of the banking industry. Subsequent to the demise of the Second Bank of the United States, all banking services were provided by banks chartered and regulated under state law until 1863, when the National Currency Act (later amended by the National Bank Act of 1864) authorized the chartering of national banking associations.[3] These new national banks, although chartered under federal law, were not national in respect to their geographic operations but were limited to a single banking office. Even when branching was permitted to national banks by the enactment of the McFadden Act in 1927,[4] each national bank was limited to branching within its home state, and continues to this day to be thus limited. "The Congress . . . has steadfastly respected the rights of the states to specify the extent to which branch banking shall be practiced within their respective borders." H.R. Rep. No. 609, *supra,* at 3.

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voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted . . . unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

[3]J. White, *Banking Law* 16-19 (1976).

[4]Ch. 191, § 7, 44 Stat. 1228, codified at 12 U.S.C. § 36.

The Douglas Amendment expressly recognizes and reiterates this longstanding policy of localism in the organization and regulation of this country's banking industry. It generally forbids the approval by the Board of any application by a bank holding company to acquire a bank located outside of the holding company's home state.[5] Thus, as a general matter, the Douglas Amendment separates the nation into numerous local banking markets for purposes of structuring the bank holding company system, just as the McFadden Act separates, on a state-by-state basis, the geographic structure of the branch banking system.

This basic regulatory pattern for the structure of the banking industry, as established by Congress, is the antithesis of the national market so often identified as the object of the Commerce Clause. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 325-326 (1979). It is nonetheless the pattern long established for the United States banking industry, reflecting a clear congressional judgment that because of its critical role in our economy, the banking industry should be localized, not nationalized.

> The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries . . . have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community . . . .

H.R. Rep. No. 609, *supra,* at 2. As Senator Douglas commented when introducing his amendment, "the pending bill, and the amendment which has just been read, are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power . . . . " 102 Cong. Rec. 6857 (1956).

This localized approach to the regulation of the banking industry's structure, although unusual, is not unique. In

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[5]This general prohibition, of course, is subject to relaxation by the states, as discussed *infra.*

enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, Congress similarly recognized that local organization and regulation should prevail with respect to another important financial intermediary, the insurance industry. *Western & Southern Life Ins. Co. v. Board of Equalization,* 451 U.S. 648, 654 (1981) (insurance business was judged by Congress to be " 'a local matter, to be subject to and regulated by the laws of the several States,' " *quoting* H.R. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945)); *accord, Prudential Ins. Co. v. Benjamin.* 328 U.S. 408, 429-430 (1946). This congressional recognition of the pattern of local organization and regulation of the insurance business made unobjectionable the retaliatory state tax at issue in *Western & Southern Life Ins. Co. v. Board of Equalization, supra,* 451 U.S., at 655.

In even more dramatic fashion, Congress, in the National Bank Act, the McFadden Act, and the Douglas Amendment, has likewise "balkanized"[6] the geographic structure of the banking industry. The clarity of this action leaves no doubt that, in the area of banking, Congress has directly addressed the issue of the proper geographic structuring of the banking industry in the United States. Because of a variety of political and economic considerations summarized in the passages quoted above, Congress has established and approved not a national market in which state boundaries are irrelevant, but rather a highly segmented and localized market. Congress, acting under the plenary authority granted to it by the Commerce Clause, may legitimately impose such restrictions and limitations on interstate commerce. *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S., at 434. The emphatic congressional judgment embodied in the Douglas Amendment that the banking industry is to be locally, not nationally, organized and regulated sets the context within which the scope of state authority granted through the Douglas Amendment must be evaluated.

B. The Douglas Amendment Authorizes the States to Permit Interstate Bank Holding Company Expansion on a Regional, Reciprocal Basis

The Douglas Amendment, while generally prohibiting bank

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[6] *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 533-534 (1949).

holding company expansion across state boundaries, also establishes a special rule permitting the states to make exceptions to this general prohibition. In relevant part, the Douglas Amendment states that the Board may not approve an acquisition of a bank located in one state by a bank holding company with its principal operations in any other state unless:

> the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. § 1842(d). As Petitioners acknowledge, the language of this exception places no restrictions on the types of state laws to which the Board is to defer (Br. of Pet. Citicorp, 21). Rather, the language of this exception recognizes an unrestricted authority in each state to determine whether and to what extent out-of-state bank holding companies may be permitted to purchase banks located within their boundaries.

Nothing in this Court's comments regarding the Douglas Amendment in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), contradicts this conclusion that the Douglas Amendment grants to the states broad discretion to alter the basic restriction established by Congress. In that case, the Court considered a challenge to the validity of a Florida statute that prohibited out-of-state bank holding companies from establishing or acquiring an investment advisory business in Florida. The State of Florida, in defense of its statute, argued, *inter alia,* that the Douglas Amendment authorized it to impose such a restriction on the activities of out-of-state bank holding companies in Florida. Observing that the Douglas Amendment applies only to acquisitions of banks regulated under Section 3 of the BHC Act, this Court rejected the suggestion that Florida could rely on the Douglas Amendment to justify restrictions on nonbanking activities regulated under Section 4 of the Act. *Id.*, at 47 & n. 13. In any event, the Court observed, the Douglas Amendment grants to the states the authority to relax the general restriction imposed by Congress (although not the authority to further restrict the market structure established by the BHC Act).

> The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited.

Id. at 47. This limited authority to *permit* interstate banking, and no other, is precisely that asserted by Connecticut and Massachusetts in enacting the Connecticut and Massachusetts Acts.[7]

Despite the absence from the statutory language of any qualification on the authority granted to the states, Petitioners contend that the Douglas Amendment confronts the states with an "all-or-nothing" choice if they desire to alter the Douglas Amendment's general restriction on a *geographic* basis.[8] Petitioners assert that states may retain the state-by-state system established by the Douglas Amendment's general rule, or may permit entry by bank holding companies from throughout the country, but may not allow entry on a regional

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[7]Petitioners, referring to this Court's discussion in *Lewis* of Section 7 of the BHC Act, argue that because Section 7 was not meant to alter the Commerce Clause restrictions normally applicable to state authority in the absence of a delegation of regulatory authority by Congress, "it follows *a fortiori* that the Douglas Amendment . . . has no such extraordinary effect." Br. of Pet. Citicorp, 22. This is an evident *non sequitur*. Nothing in the language or legislative history of the BHC Act suggests any such connection between Section 7 and Section 3(d), the Douglas Amendment. Section 7, as the Court recognized in *Lewis*, was meant only to preserve state regulatory authority over bank holding companies as it existed prior to 1956. 447 U.S., at 48-49. But this Court did not suggest in *Lewis* that the characterization of Section 7 as a savings provision for state law had any implications whatsoever for the issue of the scope of the authority granted to the states under the Douglas Amendment. When Congress simply defers to otherwise valid state laws, as it did when it enacted Section 7, the "negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress has deferred." *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982). But when, as in Section 3(d), Congress goes beyond mere deference to grant authority to the states under the Commerce Clause, the negative implications of the Commerce Clause become irrelevant. See Section I.D. *infra*.

[8]Petitioners' attempt to save this argument from immediate rejection by identifying permissible *non*-geographic bases on which states may permissibly impose discriminatory restrictions under the Douglas Amendment is discussed in Section I.D. *infra*.

basis. This argument, however, ignores the fact that in adopting the Douglas Amendment, Congress created a highly localized banking structure, rejecting a national approach to this industry. Viewed against this background, the regulatory authority granted to the states in the Douglas Amendment can only reasonably be interpreted to permit the states a more finely calibrated instrument for adjusting the banking structure than the blunt all-or-nothing approach urged by Petitioners. There is nothing at all implausible about the proposition that Congress meant to permit the states to adopt a regional approach to bank holding company expansion, once it is recognized that the basic system established by Congress has already separated the nation into numerous, even more restrictive, local banking markets.

The legislative history of the Douglas Amendment supports this conclusion that Congress did not intend to qualify or limit the authority it granted to the states to permit interstate bank holding company expansion. Senator Douglas, in explaining his amendment, remarked directly that "our amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree* that State laws expressly permit them . . . ." 102 Cong. Rec. 6858 (1956) (emphasis added). To describe the all-or-nothing law that Petitioners wish had been enacted, Senator Douglas would have said, "only *if* State laws expressly permit them." Senator Douglas' use of the expression "*to the degree* that State laws expressly permit them," indicates the understanding that the states were to be granted authority to permit various methods of interstate banking best suited to address the local concerns and needs of the individual states. Despite Petitioners' unfounded complaints about the brevity of the legislative history of this floor amendment to the BHC Act, it is difficult to see what repetition would have added to Senator Douglas' basic characterization of the Douglas Amendment's grant of authority to the states.

Senator Payne, in support of Senator Douglas' proposed amendment, likewise characterized it as granting to the states the authority to permit interstate bank holding company expansion on a basis judged to be sound and acceptable by each state. Describing the proposed amendment, Senator Payne observed that:

> This amendment would require that State legislatures pass specific legislation authorizing bank holding companies from another State to acquire interests in State banks located within its [sic] borders.

102 Cong. Rec. 6862 (1956). Again, had the amendment been meant to allow states only the authority to permit full national interstate banking, Senator Payne would have spoken not of "another State" but of "other States."[9] He, like Senator Douglas, however, understood that the grant of authority to the states in the Douglas Amendment was not meant to give to the states such a limited range of options. Rather "[t]he purpose of this amendment," he asserted, "is to return to the States their traditional control over the activities of the State banks now nominally under the State's authority." *Id.* According to Senator Payne,

> the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion rather than to have it solely under the jurisdiction of the Federal Reserve Board [as initially proposed in the Senate bill].

Id.

Senator Douglas' comparison of his proposed amendment to the McFadden Act further supports the conclusion that the exception provided in the Douglas Amendment was meant to give the states broad control and discretion in shaping the interstate bank holding company structure. The McFadden Act restricts each national bank to establishing branch offices in the state in which its principal office is located, subject to the branching restrictions of state law. 12 U.S.C. § 36.[10] Acting

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[9]Senator Douglas used the same expression when he spoke of individual states permitting "a bank holding company from *another State*" to make interstate acquisitions. 102 Cong. Rec. 6860 (1956) (emphasis added).

[10]The McFadden Act permits limited branching for national banks, subject to state law. See note 4 *supra*. This provision was amended in 1933 to permit national banks to establish branch offices within their home states, subject to the restrictions imposed by state bank branching laws. 48 Stat. 162, § 23 (1933). *See* G. Fischer, *American Banking Structure* 47-52 (1968).

under the authority of the McFadden Act, the various states have subjected national banks to a variety of branch banking rules.[11] Comparing his proposed amendment to the McFadden Act, Senator Douglas stated that:

> [The amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

102 Cong. Rec. 6860 (1956).

Whatever the purpose for which the McFadden Act was enacted,[12] Senator Douglas accurately characterized its effect of subjecting branching by national banks to the requirements of state law. Likewise, in his view, his amendment was meant to permit the states to effectuate their various policies for the structure of the bank holding company system within their borders. Just as the McFadden Act imposed no limitations on state regulation of branch banking, Senator Douglas noted no qualifications on the authority to be granted to the states "to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis v. BT Investment Managers, Inc., supra,* 447 U.S., at 47.

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[11]These state branching rules have taken the form of, for example, unit banking (*see, e.g.,* Ill. Rev. Stat. ch. 16 1/2, § 5 (1982)); county-wide branching (*see, e.g.,* Mass. Gen. Laws. Ann. ch. 167C, § 3 (1982)); and full statewide branching (*see, e.g.,* Conn. Gen. Stat. § 36-59 (1985)). Just as the states are granted complete control over the structure of branch banking within their borders through the McFadden Act, Senator Douglas intended that his amendment would grant to the states complete control over the structure of bank holding company expansion within their borders.

[12]Some commentators view the McFadden Act as primarily a parity bill meant to grant to national banks branching powers comparable to the state banks with which they compete. *See, e.g.,* 102 Cong. Rec. 6754 (1956) (remarks of Senator Robertson); Br. of Pet. Citicorp, 28. Whatever the merit of this view, the fact remains, as emphasized by other commentators, that the McFadden Act is also restrictive in nature, subjecting national banks to state branch banking laws. *See, e.g.,* 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas).

C. Prior Administrative and Judicial Decisions Have Concluded that the Douglas Amendment Authorizes the States to Differentiate Among Out-of-State Bank Holding Companies in Creating Exceptions to the Douglas Amendment's General Prohibition on Interstate Banking

When the Douglas Amendment was adopted in 1956, no state had adopted laws permitting interstate bank holding company expansion. 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas). Iowa adopted the first such law in 1972.[13] Under its terms, only one out-of-state bank holding company, Northwest Bancorporation, qualified (on a grandfathered basis) to make additional acquisitions in Iowa. The Board, in approving Northwest Bancorporation's application for an acquisition pursuant to the Iowa statute, rejected the argument that "in enacting the Bank Holding Company Act and its Amendments, Congress did not intend to allow State legislatures to *choose selectively* which out-of-state bank holding company could enter the State . . . "[14]

Since its *Northwest Bancorporation* decision, the Board has approved numerous interstate acquisitions based on state statutes that differentiate among out-of-state bank holding companies in permitting entry. In addition to acquisitions involving other state grandfathering statutes similar to the Iowa law,[15] the Board has approved acquisitions involving state laws permitting out-of-state bank holding companies to enter a state for limited purposes,[16] or subject to a reciprocity requirement imposed on the laws of their home states.[17] The Board observed in its decision in the present case that:

> These [state] statutes obviously result in some burdens on interstate commerce and appear to assume that the

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[13]The Iowa statute is set out in *Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288, 1292 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975).

[14]*Northwest Bancorporation,* 38 Fed. Reg. 21530, 21531-21532 (1973), *aff'd, Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975) (emphasis added).

[15]*E.g., NCNB Corporation,* 68 Fed. Res. Bull. 54 (1982).

[16]*E.g., Citicorp,* 70 Fed. Res. Bull. 431 (1984).

[17]*E.g., Norstar Bancorp, Inc.,* 69 Fed. Res. Bull. 306 (1983).

> states have full discretion to set the terms of entry of out-of-state bank holding companies.

Pet. App. A71. Summarizing its careful review of the Douglas Amendment in the present case, the Board, while noting some uncertainty about the legislative history of the Amendment, continued to take the same view of the authority that it confers on the states:

> [I]t can be persuasively argued that Senator Douglas construed his amendment as granting plenary power to the states to set their own policies and permit entry of out-of-state bank holding companies to the degree that they choose.

Pet. App. A67.

In a recent decision, the Board reiterated its view that the Douglas Amendment's delegation of authority to the states does not force the states to adopt an " 'all or nothing' approach to permitting entry by out-of-state bank holding companies."[18] As the Board commented in this decision, "[t]he states and the Board have consistently construed the Douglas

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[18] *Bank of New York Company, Inc.*, 70 Fed. Res. Bull. 527, 528 (1984). In that decision, the Board rejected the argument, advanced in this Court by *amicus curiae* Bank of New York Company, that any state enacting a limited entry authorization statute pursuant to the Douglas Amendment's special rule thereby effectively (albeit unintentionally) authorizes unlimited entry by all out-of-state bank holding companies. This argument flies in the face of the statute's evident purpose. As the Board observed, this argument,

> if accepted, would cause full interstate banking in those states [with limited entry statutes], a result contrary to the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interstate banking to the acquisition by out-of-state bank holding companies of banks located within the borders of a state.

Id. Accord, First Bank System, Inc., 70 Fed. Res. Bull. 771, 773-774 (1984) (forbidding an interstate acquisition not explicitly authorized under state statutory law, taking into account "the purposes and legislative history of the Douglas Amendment, which reflect an intent to preserve the authority of the states over the structure of banking within their borders"); *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 386 (1984) ("[n]othing in the history of the Douglas Amendment suggests that the states were to be

Amendment to authorize the states to limit or restrict entry by out-of-state bank holding companies."[19]

The argument that states are required by the Douglas Amendment to approach interstate bank holding company expansion on an "all or nothing" basis also was rejected by the United States Court of Appeals for the District of Columbia Circuit in *Iowa Independent Bankers v. Board of Governors.*[20] In reviewing the Board's approval of a bank acquisition consistent with the Iowa statute discussed *supra,* the court noted that the language of the Douglas Amendment did not require such an approach. The legislative history of the Amendment, moreover, led the court to conclude "that the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy."[21]

In sum, the settled administrative interpretation of the Douglas Amendment, supported by the judicial decisions addressing the issue, is that the states may differentiate among out-of-state bank holding companies in permitting interstate bank acquisitions. Petitioners, apparently admitting this general view of the authority granted to the states by the Amendment, attempt to save their position by asserting that only some bases of differentiation, such as grandfather statutes, limited purpose entry statutes, or reciprocal statutes, are permissible, while the regional approach of the Connecticut and Massachusetts Acts is not.[22] The Douglas Amendment and its legislative history, however, contain not a hint of this distinction urged by Petitioners

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permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry").

[19]*Bank of New York Company, Inc.,* note 18 *supra,* 70 Fed. Res. Bull., at 528.

[20]Note 13 *supra,* 511 F.2d, at 1296-97.

[21]*Id.* at 1297. *See Conference of State Bank Supervisors v. Conover,* 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S. Ct. 1708 (1984) ("the Douglas Amendment empowered states to discriminate among out-of-state bank holding companies when deciding which could enter").

[22]Br. of Pet. Citicorp, 37-38.

between permissible and impermissible discrimination. Nor, as pointed out in the following section, can Petitioners find any basis for this distinction in the Commerce Clause.

D. Because the Douglas Amendment Authorizes the Connecticut and Massachusetts Acts, They Are Not Subject to the Negative Implications of the Commerce Clause

This Court has held consistently that Congress, acting under the Commerce Clause, may grant to the states authority to regulate interstate commerce that they would not otherwise enjoy. *See, e.g., Lewis v. BT Investment Managers, Inc., supra,* 447 U.S., at 44. In *Lewis,* this Court observed that in the Douglas Amendment, Congress has given to the states the authority "to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Id.* at 47. Because Connecticut and Massachusetts have acted within the scope of this general grant of authority to the states in enacting the Connecticut and Massachusetts Acts, their actions are "invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co. v. State Board of Equalization, supra,* 451 U.S., at 653.

The Petitioners appear to argue, however, that Congress could not have granted authority to the states to adopt laws such as the Connecticut and Massachusetts Acts without violating the Commerce Clause. The regional approach adopted in the Acts, Petitioners urge, is inconsistent with the national market that is protected by the negative implications of the Commerce Clause. By contrast, according to Petitioners, state entry laws that discriminate on the basis of grandfather rules, limited purpose entry rules, or reciprocity requirements do not offend the negative implications of the Commerce Clause. Br. of Pet. Citicorp, at 37. Citing *Sporhase v. Nebraska, supra,* 458 U.S., at 960, for the proposition that "[t]he negative implications of the Commerce Clause . . . are the ingredients of the *valid* state law to which Congress" defers, Petitioners urge that the

negative Commerce Clause limits the types of laws the states may adopt to permit interstate bank holding company expansion.[23]

This Court rejected the Petitioners' approach to the Commerce Clause when it decided *Prudential Ins. Co. v. Benjamin, supra.* In that case, a state tax imposed only on out-of-state insurance companies was challenged as a violation of the Commerce Clause. Although the McCarran-Ferguson Act appeared to validate the tax, Prudential argued that such a conclusion would be inconsistent with the Commerce Clause. Prudential, the Court observed, "puts the McCarran Act to one side, either as not intended to have effect toward validating this sort of tax or, if construed otherwise, as constitutionally ineffective to do so." *Id.* at 422. The Court, disagreeing strongly with this suggestion, concluded that congressional grants to the states of the authority to regulate commerce are not limited by the negative implications of the Commerce Clause.[24] Rather, unless Congress by explicit exceptions limits such grants of authority, the states are empowered to exercise the full authority otherwise possessed by Congress to regulate the particular type of interstate commerce in question. Congress, as this Court observed, had "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause . . . subject only to the exceptions expressly provided for." *Id.*, at 431.

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[23]As in *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S., at 422, Petitioners also assert that because of the policies of national markets recognized in the negative Commerce Clause, Congress did not intend to authorize such a regional approach. As pointed out *supra,* however, Congress rejected the notion of a national banking market when it adopted the Douglas Amendment. With the Douglas Amendment, Congress left it to the states, guided by their own local interests, to determine the extent to which the nation's segmented banking markets should be integrated.

[24]The Court summarized its view of Prudential's argument as follows:

> Fundamentally [Prudential] maintains that the commerce clause "of its own force" and without reference to any action by Congress, whether through its silence or otherwise, forbids discriminatory state taxation of interstate commerce. This is to say, in effect, that neither Congress acting affirmatively nor Congress and the states thus acting coordinately

The Douglas Amendment imposes no exceptions or limitations on the authority it grants to the states to permit interstate bank holding company expansion.[25] Petitioners' effort to create such exceptions or limitations by finding in the negative implications of the Commerce Clause distinctions between "permissible" and "impermissible" state laws authorizing bank holding company expansion is, therefore, futile. Discriminations more or less offensive to the Commerce Clause in the absence of the Douglas Amendment are all equally protected by that Amendment's unqualified grant of authority.[26]

Petitioners likewise mistakenly rely on negative Commerce Clause cases such as *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In those cases, no grant by Congress to the states of authority to regulate interstate commerce was present.

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can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant. In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.

Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent. For in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power.

Prudential Ins. Co. v. Benjamin, supra, 328 U.S., at 422 (footnotes omitted).

[25]In contrast, the federal statutes and the compacts examined in *Sporhase v. Nebraska, supra,* did not even indicate congressional intent to delegate federal regulatory authority to the states. 458 U.S., at 959-960. Instead, Congress meant only to defer to, rather than preempt, otherwise valid state law. *Id.,* at 960. See n. 7 *supra.*

[26]While considerations arising from the negative Commerce Clause do not limit the authority delegated under the Douglas Amendment, other constitutional provisions do. Acting under the Commerce Clause, Congress may not authorize the states to exceed the limits imposed by other constitutional provisions. *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S., at 430, 434-435. Petitioners, however, have claimed only that the Connecticut and Massachusetts Acts violate the Commerce Clause and the Compact Clause, under both of which Congress does have authority to approve state activities not otherwise permissible.

Absent such an exercise of Congress' plenary power to regulate interstate commerce, this Court in these and other similar cases condemned state laws that were explicitly protectionist or imposed burdens on interstate commerce that outweighed the local benefits sought to be obtained by the enactment of the challenged state law. *Philadelphia v. New Jersey, supra,* 437 U.S., at 624, 626-627; *Pike v. Bruce Church, Inc., supra,* 397 U.S., at 142, 146. But where Congress acts to restrict or burden interstate commerce, the concerns voiced in these cases are simply inapplicable. *Western & Southern Life Ins. Co. v. State Board of Equalization, supra,* 451 U.S., at 653. Here, because Congress has acted to grant regulatory authority to the states by adopting the Douglas Amendment, it is inappropriate to pursue issues such as protectionism or balancing. Rather, the only question is whether Connecticut and Massachusetts have acted within the scope of the authority granted to them by Congress, a question which, as a matter of history, statutory language, and legislative record, must be answered in the affirmative.

II. The Connecticut and Massachusetts Acts Do Not Contravene The Compact Clause

The "Compact Clause" of the United States Constitution provides, in relevant part, that:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .

U.S. Const. art. I, § 10, cl.3. Consistent with this language, action may violate the Compact Clause only if it involves *an agreement or compact* between or among states.

A. No Agreement or Compact Has Been Formed

The state action challenged here involves independently enacted state statutes, rather than an agreement or compact between or among states. To illustrate this point, assume that only one New England state had passed an out-of-state bank holding company entry statute which was limited to bank holding companies located in New England. Such a statute

also would permit acquisitions across state lines subject to regional constraints, but *clearly* could not involve an agreement or compact. The added fact that an additional state legislative body has chosen, independently, to enact similar legislation should not transform such independent activity into an impermissible agreement or compact between or among the states.[27]

The reciprocity requirements of the Connecticut and Massachusetts Acts, in and of themselves, are of no consequence for purposes of the Compact Clause. In *United States Steel Corp. v. Multistate Tax Commission, supra,* 434 U.S., at 452, the Court noted that "several decisions of this Court have upheld a variety of interstate agreements effected through reciprocal legislation without congressional consent." *Id.* at 469. While "[a]greements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy", the mere form of such legislation is not the relevant inquiry. Rather, "[t]he relevant inquiry must be one of impact on our federal structure." *Id.* at 470-471. As discussed *infra,* the Connecticut and Massachusetts Acts lack any impact on the federal structure.

Furthermore, Petitioner Citicorp's argument that "reciprocal legislation such as that involved in this case is in and of itself sufficient to constitute a compact" (Br. of Pet. Citicorp, 40) is clearly inconsistent with recent activities of Petitioner Citicorp. For example, in 1983 Citicorp sought approval from the Board to acquire a bank in the State of

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[27]The Compact Clause appears initially to have been directed at resolving boundary disputes between the newly independent states. "[T]he Compact Clause has its roots deep in colonial history. It is part and parcel of the long and familiar story of colonial boundary controversies." F. Frankfurter & J. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments,* 34 Yale L.J. 685, 692 (1925). This article, containing an in-depth study of the types of legislation which have elicited application of the Compact Clause, does not mention a single challenge under the Compact Clause to independent regional state legislation such as that under challenge in the present controversy. Similarly, Petitioners have failed to cite to any such decision.

Maine. This acquisition was premised on the constitutionality of both the Maine and New York interstate banking laws, which at that time allowed interstate acquisitions of banks by bank holding companies on a reciprocal basis. This acquisition by Petitioner of a New England bank, Citibank Maine, N.A., was approved by the Board in April 1984, as noted in *Citicorp,* 71 Fed. Res. Bull. 101, 102 (1985).[28]

Petitioners also place great weight on the fact that concerned individuals from the New England states met prior to the passage of the Connecticut and Massachusetts Acts to discuss their concerns over interstate banking. Br. of Pet. Citicorp, 40. It is difficult to perceive how the existence of these meetings may evidence the establishment of a compact. These meetings were not in any sense mandatory or binding on any of the New England states. In fact, New Hampshire and Vermont independently have chosen not to enact interstate banking legislation, Maine has chosen, again independently, to permit out-of-state bank holding company entry on a full nationwide basis, and Rhode Island has adopted a regional approach that will give way in 1986 to unlimited nationwide entry.

Each of the New England states has attempted to address its own local banking concerns in the manner best suited to that particular state. This authority was explicitly granted to each state in the Douglas Amendment. The fact that Connecticut and Massachusetts independently have recognized similar concerns and acted accordingly is insufficient to establish an impermissible compact between the states.

In *St. Louis & San Francisco Railway v. James,* 161 U.S. 545 (1896), this Court noted that a state may permissibly authorize a corporation organized under its laws to accept authority from another state to extend its operations into such other state, to receive a grant of powers to own and control property therein, and to subject itself to such rules and regulations as may be prescribed by the second state. The

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[28]The reciprocity requirement was removed from the Maine statute in February 1984. 1984 Me. Laws 597.

Court stated that "[s]uch legislation *on the part of two or more States* is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States." *Id.* at 562 (emphasis added). The Connecticut and Massachusetts Acts are precisely such legislation. They merely authorize the entry of private corporations into their respective states on a regional basis. Such independently enacted statutes do not, in fact, create an agreement or compact.

B. The Connecticut and Massachusetts Acts are Permissible Under Settled Compact Clause Doctrine

Even assuming, *arguendo,* that the Connecticut and Massachusetts Acts could be viewed as creating an agreement or compact, such action nevertheless clearly is permissible under this Court's long-settled Compact Clause precedents. In *Virginia v. Tennessee,* 148 U.S. 503 (1893), Mr. Justice Field suggested that congressional consent is required only for agreements or compacts that affect "the political power or influence" of individual states and "encroach . . . upon the full and free exercise of Federal authority." *Id.* at 520.

This interpretation was reaffirmed in this Court's decision in *New York v. O'Neill,* 359 U.S. 1 (1959). Although no Compact Clause question was presented directly in that case, the Court stated that:

> The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution. Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area of action left to the States by the Constitution.

Id. at 6. The Connecticut and Massachusetts Acts are such voluntary and cooperative actions, taken by those states as independent exercises of their authority granted pursuant to the Douglas Amendment.

More recently, this Court noted in *New Hampshire v. Maine,* 426 U.S. 363 (1976), that the application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States . . . . Accordingly, [actions fall without the Compact Clause when] neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government." *Id.* at 369-70 (citations omitted).[29]

Even assuming an agreement or compact were deemed to exist in the present situation, it is difficult to perceive how such an arrangement could increase the "political power or influence" of any state or states or could "encroach upon or interfere with the just supremacy of the United States." Petitioners argue that the Connecticut and Massachusetts Acts create a compact that tends to cause injury to the sister states. Br. of Pet. Citicorp, 40. Petitioners have not established any such injury to a sister state, however, nor could such a finding be justified on the present record. To the extent that any limited injury could arguably occur as a result of the Connecticut and Massachusetts Acts, such injury would be solely to private parties such as Petitioners, rather than to a sister state or states as sovereign entities.

Further, Petitioners have not established any encroachment upon federal authority[30] other than to state their mere

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[29]In *United States Steel Corp. v. Multistate Tax Commission, supra,* 434 U.S., at 471, this Court noted that in *New Hampshire v. Maine, supra:*

> We reaffirmed Mr. Justice Field's view that the "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' " This rule states the proper balance between federal and state power with respect to compacts and agreements among States. [citations omitted]

[30]*See* F. Zimmerman & M. Wendell, *The Law and Use of Interstate Compacts* (1976), at 23 ("[c]onceivably, compacts which might be said to

conclusion that the Connecticut and Massachusetts Acts "interfer[e] with and disrupt[ ] federal regulation of interstate banking." Br. of Pet. Citicorp, 42. This conclusion is clearly erroneous. The Connecticut and Massachusetts Acts in no way interfere with or disrupt federal regulation of interstate banking. As noted by the court of appeals,[31] Congress, through the Douglas Amendment, long ago granted control over this aspect of interstate banking to the individual states.[32]

Petitioners also attempt to establish that the Connecticut and Massachusetts Acts violate the Compact Clause merely because they may be distinguished from the "type of interstate agreement upheld in *Multistate Tax Commission.*" Br. of Pet. Citicorp, 44. Petitioners fail to mention, however, that the interstate compact which was upheld by the Court in that decision was far more likely to increase the political power or influence of the states and to encroach upon the supremacy of the United States than the challenged legislation.[33] In view of the Court's determination that there was no Compact

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have a discriminatory effect upon nonparty states could be described as affecting the political balance of the federal system. In actuality, there have been no compacts adopted or proposed in our history which have really affected that political balance"). As the court of appeals noted below, "[a]s a practical matter, we do not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." Pet. App. A32.

[31]The Board, as the court of appeals observed, has interpreted the Douglas Amendment as a renunciation of any federal interest in regulating the interstate acquisitions of banks by bank holding companies. Pet. App. A29. As this Court recently pointed out in *Securities Industry Association v. Board of Governors,* ___ U.S. ___, 104 S. Ct. 2979 (1984), the Board's interpretations of federal banking statutes are entitled to substantial deference.

[32]Petitioner's argument that the challenged legislation is "a substantial threat to federal policy articulated in 12 U.S.C. §1823(f)" (Br. of Pet. Citicorp, 46) is not tenable. That statute, regarding interstate acquisitions of failed banks, by its express terms controls such acquisitions "[n]otwithstanding . . . any other provision of law, state or Federal." 12 U.S.C. § 1823(f)(4)(i). Further, to the extent that the challenged state legislation were to conflict with federal legislation, it would be preempted pursuant to the Supremacy Clause, U.S. Const., art. VI, cl.2.

[33]In *United States Steel Corp. v. Multistate Tax Commission, supra,* the facts established that a Multistate Tax Compact, which authorized the

Clause violation in the "multilateral agreement" presented in that case, the independently enacted Connecticut and Massachusetts Acts cannot possibly violate the Compact Clause.

CONCLUSION

For the reasons set forth above, the decision and judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
WILLIAM G. DELANA
ALLAN B. TAYLOR
J. BRUCE BOISTURE*
ROBERT M. TAYLOR, III
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
Counsel for *Amicus Curiae*
Fleet Financial Group, Inc.

Of Counsel:

EDWARD W. DENCE, JR.
WILLIAM C. MUTTERPERL

**Counsel of Record*

---

establishment of the Multistate Tax Commission, had been adopted with minor exceptions in twenty-one states. The Commission had authority, *inter alia,* to adopt uniform regulations which member states could reject, amend, or modify before adoption. Further, states were authorized to request that the Commission perform audits on their behalf. In so doing, the Commission could seek compulsory process in aid of its auditing powers in state courts. 434 U.S., at 803-805. Nevertheless, this "multilateral agreement creating an active administrative body with extensive powers delegated to it by the States, but lacking congressional consent" (*id.,* at 471) was not found to violate the Compact Clause.

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No. 84-363

IN THE

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Northeast Bancorp, Inc.,
Union Trust Company and Citicorp,
Petitioners,

v.

The Board of Governors of
The Federal Reserve System,
Respondent,

and

Bank of New England Corporation, CBT Corporation, Hartford National Corporation, The Commonwealth of Massachusetts, The State of Connecticut and Bank of Boston Corporation,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE STATE OF GEORGIA IN SUPPORT OF RESPONDENTS

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

GRACE E. EVANS
Assistant Attorney General

JEFF L. MILSTEEN
Attorney
Counsel for Amicus Curiae

Counsel of Record:

GRACE E. EVANS
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3376

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BRIEF AMICUS CURIAE OF THE STATE OF GEORGIA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The State of Georgia respectfully files, pursuant to Rule 36.4 of this Court, this brief *amicus curiae* in support of respondents.

The State of Georgia has a vital interest in the issues presented in this case. In 1984, the General Assembly of the State of Georgia enacted a regional interstate banking act. 1984 Ga. Laws p. 1467, O.C.G.A. § 7-1-620 *et seq.* (Michie Supp. 1984) (attached as Appendix 1) (hereinafter "Georgia Act"). The Georgia Act is analogous to the Massachusetts and Connecticut statutes at issue in that it authorizes Georgia bank holding companies to acquire or be acquired by other bank holding companies located in a defined southern region of the country under certain circumstances.[1] This Court's decision as to the constitutionality of the regional banking statutes at issue in the present case may be directly relevant to the constitutional validity of the Georgia Act.

SUMMARY OF ARGUMENT

Petitioners have misconstrued the purposes and effects of regional banking statutes and have ignored the significant amount of interstate banking and finance in which they and other large bank holding companies currently engage. Regional banking laws do not, as petitioners contend, create new barriers to interstate commerce. Instead, such laws reduce the legal barriers to certain interstate banking activities and facilitate the development and expansion of banking institutions capable of competing effectively with Petitioner Citicorp and other money center giants. The State of Georgia submits this

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[1] The Georgia Act defines the southern region as including Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. O.C.G.A. § 7-1-620(10). Bank holding companies from states in the southern region may acquire Georgia banks so long as the laws of the particular state allow Georgia bank holding companies a comparable right to acquire its banks. O.C.G.A. § 7-1-621(c).

brief to demonstrate the purpose and effect of regional banking laws.[2]

ARGUMENT

REGIONAL RECIPROCAL STATE BANKING STATUTES ARE A REASONABLE AND PRO-COMPETITIVE IMPLEMENTATION OF THE STATES' AUTHORITY UNDER THE DOUGLAS AMENDMENT TO EXPAND INTERSTATE BANKING

In the last two years, at least nine states have approved expanded interstate banking activity through regional banking laws. The statutes in Georgia and at least eight other states, including the Massachusetts and Connecticut statutes at issue here,[3] allow a bank holding company from one state within a specified region to acquire a bank in another state in the region so long as bank holding companies in other states are afforded reciprocal rights. The laws in two of these states, Rhode Island and Kentucky,

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[2] The State of Georgia substantially agrees with the intervenor-respondents' discussion of the constitutional issues in this case. In the interest of brevity, that discussion will not be repeated here.

[3] As of November, 1984, the nine states that had enacted regional reciprocal laws were Connecticut, 1983 Conn. Pub. Act 83-411 (Reg. Sess.); Florida, Fla. Stat. Ann. § 658.295 *et seq.* (West Supp. 1984); Georgia, O.C.G.A. § 7-1-620 *et. seq.* (Michie Supp. 1984); Kentucky, Ky. Rev. Stat. § 287-900 *et seq.* (1984); Massachusetts, Mass. Ann. Laws ch. 167A, § 2 (West Supp. 1984); North Carolina, N.C. Gen. Stat. § 53-209 *et seq.* (1984); Rhode Island, R.I. Gen. Laws § 19-30-1, 19-30-2 (1983); South Carolina, S.C. Laws tit. 34, ch. 24, 25 (Supp. 1985); and Utah, Utah Code Ann. § 7-1-702 (Supp. 1984). Thirteen other states have also enacted some form of interstate banking law. For example, Alaska, Alaska Stat. § 06.05.235 (1982) and Maine, Me. Pub. Law 1983, ch. 302 § 2 as amended (1984), permit interstate ownership without reciprocity, and New York, N.Y. Banking Law § 142-b (McKinney Supp. 1983), requires reciprocity. *See* D. Whitehead, "Interstate Banking: A Probability or Reality?" *Economic Review* (March 1985).

provide a specific date upon which the regional scheme will further expand to allow any out-of-state bank holding company to acquire local banks. Each of these laws has the same purpose: to facilitate increased interstate banking activity in a rational and orderly way so as to promote the safety and soundness of the banking system. Furthermore, these laws are entirely in accord with the objective of the Bank Holding Company Act [4] to foster the development of banking institutions that will be responsive to local interests.[5]

A. Regional Banking Statutes Were Enacted to Facilitate Increased Interstate Banking.

Regional banking laws do not create barriers to interstate banking. Rather, they facilitate increased interstate banking by reducing the geographical limitations on bank acquisitions imposed by the Douglas Amendment, 12 U.S.C. § 1842(d). The Bank Holding Company Act was enacted to prevent undue concentration of banking resources,[6] and the geographic limitations imposed by the Douglas Amendment are consistent with that purpose. The Douglas Amendment also recognizes, however, the traditional authority of states to decide whether and to

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[4] 12 U.S.C. § 1841 *et seq.*

[5] *Compare* H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955) (Joint Appendix at page A5) *with* Georgia Dept. of Banking and Finance, "Regional Interstate Banking for Georgia," Report Submitted to Georgia General Assembly in consideration of H.B. 1198, Jan. 18, 1984 (Appendix 7): "The rationale for such legislation is that permitting expansion of commercial banking activities within a region of common interest will permit Georgia's and the region's economy to receive the benefits of having major financial institutions based within its borders which have the capacity to serve the greater needs of a growing, developing business community containing regional and national businesses and industries and which are sensitive to the unique needs, attitudes, business practices and commitments of businesses and commerce within the region."

[6] *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955).

what extent to increase interstate banking activity by empowering the states to lift the federal bar on interstate acquisitions.[7] In evaluating any state's decision to lift the bar of the Douglas Amendment, it is important to recognize the nature and extent of interstate banking that currently exists independent of the strictures of the Douglas Amendment.

Petitioner Citicorp's characterization of regional banking laws as "boycotts" against banks located in a few "money center" states simply ignores the current reality of interstate banking. Bank holding companies are currently permitted by Federal Reserve Board regulation to engage in twenty-two activities closely related to banking throughout the United States, including extension of credit, issuance of credit cards, operation of industrial banks, the providing of investment and financial advice, and others.[8] Bank holding companies are also permitted by order of the Federal Reserve Board to perform twenty additional bank-related functions, including transactions in precious metals, brokerage services, and underwritings of governmental securities.[9] They may also establish limited service banks in other states and acquire certain savings and loan institutions.

The institutions exploiting these opportunities for interstate expansion of banking activities have primarily

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[7] As Senator Douglas explained, the "amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them*. . . ." 102 Cong. Rec. 6858 (1956) (emphasis added).

[8] This does not mean, of course, that States may not in certain instances lawfully prohibit activities of bank holding companies which would otherwise be permissible under Section 4(c)(8) of the Bank Holding Company Act. *See* 12 U.S.C. § 1846.

[9] *See* Appendix 2.

been the "money center" banks. As of 1982, bank holding companies headquartered in three states controlled over 60% of all interstate offices engaging in activities permitted by Federal regulation.[10] Those interstate offices were spread throughout the nation, with a particular concentration of interstate activity in the Southern region.[11] In the South, for example, bank holding companies as of 1982 controlled 2,027 interstate offices engaged in 4,389 banking-related activities permitted under Federal regulations.[12]

When viewed in this context, regional reciprocal banking laws are appropriate and realistic approaches to interstate banking. They will facilitate the development of regional institutions capable of competing with the money center banks, which are currently engaged in extensive interstate banking. These statutes can hardly be characterized as a "boycott" of money center banks or as additional barriers to interstate banking. Indeed, as a Vice-President of Petitioner Citicorp has stated, "[t]he interstate banking issue is really a misnomer. We're already here."[13]

B. Regional Reciprocal Laws Will Foster Competition Between Money Center and Regional Banks.

Petitioners' construction of the Douglas Amendment would permit states essentially only two options in exercising their rights under the Douglas Amendment. States must either leave their borders closed to interstate bank

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[10] Section 4(c)(8) of Federal Reserve Board Regulation Y, 12 C.F.R. § 225.4(c)(8). *See* Appendix 3.

[11] *See* Appendix 4.

[12] *See* Appendix 5 and Appendix 6.

[13] "Interstate Push by Big Banks," *New York Times*, Nov. 26, 1984, p. D1.

acquisitions, or in the alternative, permit full unrestricted entry of all out-of-state banks. Either of these options would cement the dominance of money center banks such as Petitioner Citicorp and *amicus curiae* Chase Manhattan Corporation over the interstate banking market, and neither would provide the type of competitive environment contemplated by regional banking legislation.

The size advantage enjoyed by money center banks over banks from other regions is enormous. Petitioner Citicorp alone had assets in June, 1984 of over $143 billion, more than *four times* the assets of all Georgia banks combined.[14] Indeed, Citicorp's assets exceed those of the twenty-five largest bank holding companies in the ten Southern region states combined.[15] When the assets of Citicorp and *amicus* Chase Manhattan are totalled, they exceed those of *all banks* from the five largest Southern states.[16] Finally, the ten largest money center bank holding companies have almost twice the assets of all banks in all ten Southern states.[17]

This asset advantage provides money center banks with the opportunity to establish and exploit an interstate network of bank-related organizations in a way that effectively stifles competition. Citicorp's network is illustrative. As of late 1983, Citicorp had established offices in 41 states, with literally thousands of employees working in interstate facilities. These activities are graphically depicted on the following map:

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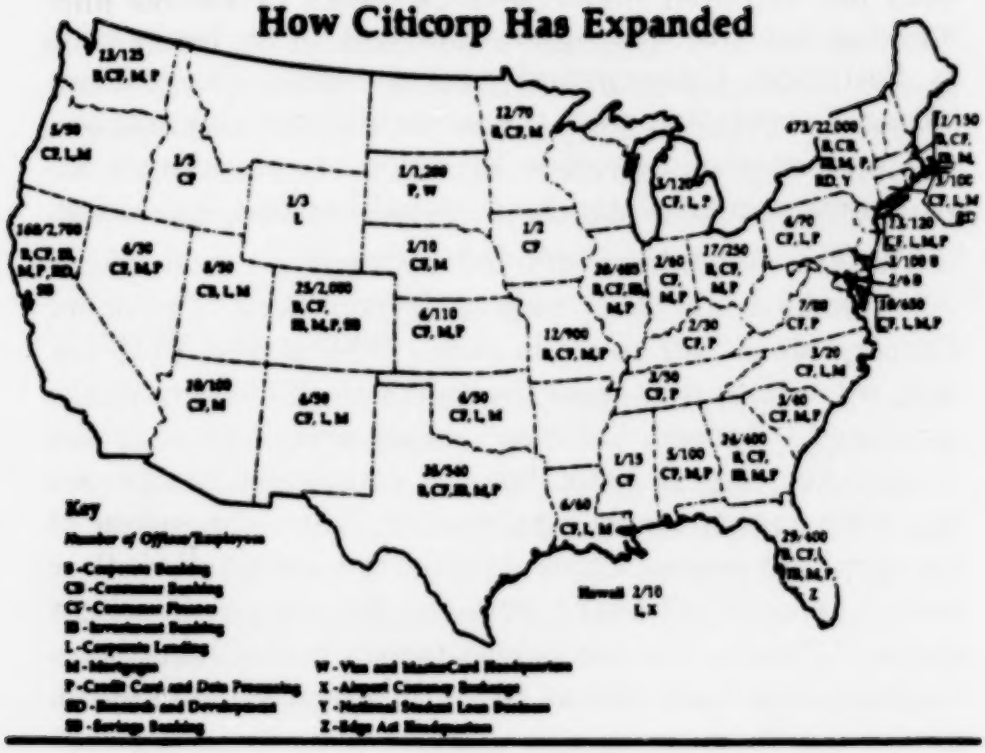
[14] *See* Appendix 8.

[15] *See* Appendix 9.

[16] *See* Appendix 8.

[17] *See* Appendix 10. Similar comparisons can be made for money center banks and banks from the New England Region. *See* Joint Appendix A22-23.



Source: "Interstate Banking Spreads Rapidly
Despite Laws Restricting Practice,"
Wall Street Journal
December 19, 1983, p. 27

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Since the publication of the foregoing map in 1983, Citicorp has acquired major savings banks in Illinois and Florida, has opened a full-service bank in Maine and has opened limited service banks in Maryland and Nevada. Moreover, Citicorp has engaged in massive marketing of its multi-service consumer Financial Account, and has gained access to an automatic teller network to provide cash to Citicorp customers nationwide.[18]

Acknowledging that the purpose of this expansive strategy is to establish a network to exploit full interstate banking, then-Citicorp Chairman Walter Wriston remarked

> [w]hen the statutes are changed (to allow full interstate banking), we can change the signs and be there with promises already made, computer systems operating and customers already called on.[19]

Regional banking statutes establish a framework within which local bank holding companies can expand and consolidate with other banks, without limiting the ability of money center banks to pursue their current aggressive interstate marketing programs. Such statutes serve the purpose of facilitating interstate activity and competition and maintaining a diverse banking community responsive to local needs.[20] The State of Georgia respectfully urges

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[18] "Citicorp Goes Cross Country With ATMs," *American Banker*, Jan. 18, 1985, p. 1.

[19] "Interstate Banking Spreads Rapidly Despite Laws Restricting Practice," *Wall Street Journal*, Dec. 19, 1983, p. 27.

[20] The regional approach to banking is neither unprecedented nor unreasonable. In New York, the expansion of branching laws proceeded first by the creation of branching regions. Only after the regional system was in place for a number of years did New York adopt statewide branching. Indeed, even representatives of Peti-

the Court to recognize the constitutional validity of these laws.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

VERLEY J. SPIVEY
Senior Assistant Attorney General

GRACE E. EVANS
Assistant Attorney General

JEFF L. MILSTEEN
Attorney

Please address all
correspondence to:

GRACE E. EVANS
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3376

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tioner Citicorp have acknowledged that a "consolidation period" in some states is a "reasonable approach" to the problems created by geographic deregulation. Hans R. Angermueller, "Albania and the Balkanization of America," speech delivered to Florida Economic Club, Tallahassee, Florida, March 29, 1984 at p. 9 (Appendix 11).

No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Northeast Bancorp, Inc.,
Union Trust Company and Citicorp,

Petitioners,

v.

The Board of Governors of
The Federal Reserve System,

Respondent,

and

Bank of New England Corporation, CBT Corporation, Hartford National Corporation, The Commonwealth of Massachusetts, The State of Connecticut and Bank of Boston Corporation,

Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 1985 three copies of the Brief Amicus Curiae of the State of Georgia in Support of Respondents were deposited in the United States Mail, postage prepaid, addressed to each counsel of record as follows:

Mr. Ira M. Millstein
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153

Mr. George D. Reycraft
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, New York 10038

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Mr. Wilmot T. Pope
Choate, Hall & Stewart
60 State Street
Boston, Massachusetts 02109

Mr. Bertram M. Kantor
Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, New York 10171

Mr. Douglas M. Kraus
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022

Mr. Thomas Kiley
Assistant Attorney General
One Ashburton Place
Boston, Massachuetts 02108

Mr. John G. Haines
Assistant Attorney General
P. O. Box 120
Hartford, Connecticut 06101

Mr. Stuart C. Stock
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

I further certify that all parties required to be served have been served.

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Counsel for Amicus Curiae

APPENDIX 1

BANKING AND FINANCE—INTERSTATE BANKING ON A REGIONAL BASIS PERMITTED, ETC.

Code Title 7, Chapter 1 Amended.

No. 1314 (House Bill No. 1198).

AN ACT

To amend Article 2 of Chapter 1 of Title 7 of the Official Code of Georgia Annotated, relating to banks and trust companies, so as to provide a unified and orderly method of permitting limited interstate banking on a regional basis; to define certain terms; to authorize the commissioner of banking and finance to approve certain acquisitions by a Georgia bank holding company or a Southern Region bank holding company under certain conditions; to authorize a Southern Region bank holding company having a Georgia bank subsidiary to acquire a Southern Region bank holding company under certain conditions; to provide that the commissioner of banking and finance shall not approve certain applications unless certain conditions are met; to prohibit certain acquisitions by any Georgia bank holding company or Southern Region bank holding company; to provide that a Southern Region bank, a Southern Region bank holding company, Georgia bank or Georgia bank holding company may acquire or control, and shall not cease to be a Southern Region bank, Southern Region bank holding company, Georgia bank or Georgia bank holding company by virtue of its acquisition or control of certain financial institutions; to provide that a Georgia bank holding company or a Southern Region bank holding company may acquire a bank or bank hold-

ing company under certain conditions; to provide that a Georgia bank holding company or Southern Region bank holding company controlling a Georgia bank may acquire certain financial institutions; to authorize the commissioner to enforce certain prohibitions by requiring divestiture of nonconforming banks, bank holding companies, or assets through the imposition of fines and penalties or through the exercise of certain other remedies; to provide that any Georgia bank holding company and any Southern Region bank holding company controlling a Georgia bank shall be subject to the registration, reporting, examinations, control, rules, and regulations of the department applicable to bank holding companies; to provide that any company that controls a Georgia bank that is not otherwise organized under the laws of Georgia or qualified to do business in Georgia shall qualify to do business in Georgia as a foreign corporation and shall advise the department of its initial registered office and the name of its initial registered agent, and shall also advise the department of any changes in its registered office and agent; to authorize the department to enter into cooperative and reciprocal agreements with the bank regulatory authorities in other states; to authorize the department to enter into joint actions with other regulatory authorities having concurrent jurisdiction or to enter into such actions independently to carry out its responsibilities; to provide for legislative intent; to provide for nonseverability; to provide for other matters relative to the foregoing; to provide an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Article 2 of Chapter 1 of Title 7 of the Official Code of Georgia Annotated, relating to banks and trust

companies, is amended by adding a new Part 19 immediately following Part 18 to read as follows:

"Part 19

7-1-620. As used in this part, the term:

(1) 'Acquire,' as applied to a bank holding company means any of the following actions or transactions:

(A) The merger or consolidation with another bank holding company;

(B) The acquisition of the direct or indirect ownership or control of voting shares of another bank holding company or bank if, after such acquisition, such bank holding company will directly or indirectly own or control more than 5 percent of any class of voting shares of such bank holding company or bank;

(C) The direct or indirect acquisition of all or substantially all of the assets of another bank holding company or bank; or

(D) The taking of any other action that would result in the direct or indirect control of another bank holding company or bank.

(2) 'Bank' means any insured institution as such term is defined in Section 3(h) of the Federal Deposit Insurance Act, 12 U.S.C. Section 1813(h), or any institution eligible to become an insured institution as such term is defined therein, which, in either event:

(A) Accepts deposits that the depositor has a legal right to withdraw on demand; and

(B) Engages in the business of making commercial loans.

(3) 'Banking office' means any parent bank, branch bank, or bank office as such terms are defined in Code

Section 7-1-600, or any other office at which a bank accepts deposits. The term banking office shall not include, however, the following:

(A) Unmanned automatic teller machines, point-of-sale terminals, or other similar unmanned electronic banking facilities at which deposits may be accepted;

(B) Offices located outside the United States; or

(C) Loan production offices, representative offices, or other offices at which deposits are not accepted.

(4) 'Bank holding company' means any company which is a bank holding company under either Code Section 7-1-605 or Section 2(a) of the federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. Section 1841(a).

(5) 'Control' means that which is set forth either in Code Section 7-1-605 or Section 2 of the federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. Section 1841.

(6) 'Deposits' means, with respect to a bank, all demand, time, and savings deposits of individuals, partnerships, corporations, the United States government, and states and political subdivisions in the United States. Determinations of deposits shall be made by reference to regulatory reports of condition or similar reports filed by such bank with state or federal regulatory authorities.

(7) 'Georgia bank' means a bank organized under the laws of this state or of the United States and, in either event, having banking offices located only in this state.

(8) 'Georgia bank holding company' means a bank holding company that:

(A) Has its principal place of business in the State of Georgia;

(B) Has total deposits of its Southern Region bank subsidiaries and Georgia bank subsidiaries exceeding 80 percent of the total deposits of all bank subsidiaries of such bank holding company other than those bank subsidiaries held under subsection (a) of Code Section 7-1-622; and

(C) Is not controlled by a bank holding company other than a Georgia bank holding company.

(9) 'Principal place of business' of a bank holding company means the state in which the aggregate deposits of the bank subsidiaries of such bank holding company are the largest.

(10) 'Southern Region states' means the States of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

(11) 'Southern Region bank' means a bank other than a Georgia bank organized under the laws of one of the Southern Region states or of the United States and, in either event, having banking offices only in the Southern Region states.

(12) 'Southern Region bank holding company' means a bank holding company that:

(A) Has its principal place of business in a Southern Region state other than the State of Georgia;

(B) Has total deposits of its Southern Region bank subsidiaries and Georgia bank subsidiaries exceeding

80 percent of the total deposits of all bank subsidiaries of such bank holding company other than those bank subsidiaries held under subsection (a) of Code Section 7-1-622; and

(C) Is not controlled by a bank holding company other than a Southern Region bank holding company.

(13) 'Subsidiary' means that which is set forth either in Code Section 7-1-605 or Section 2 of the federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. Section 1841.

7-1-621. (a) Upon compliance with the provisions of Code Section 7-1-606, which provisions shall be expressly applicable to any such acquisition, and subject to the qualifications of subsections (c) and (d) below:

(1) A Georgia bank holding company may acquire another Georgia bank holding company or Georgia bank;

(2) A Georgia bank holding company may acquire a Southern Region bank holding company or a Southern Region bank;

(3) A Southern Region bank holding company may acquire a Georgia bank holding company or a Georgia bank; and

(4) A Southern Region bank holding company may acquire a Southern Region bank holding company having a Georgia bank subsidiary; provided, however, that the commissioner must rule on any application to him seeking approval to engage in a transaction under this paragraph (4) not later than 90 days following the date of submission of a completed application to him seeking approval of such transaction. If the commissioner fails to rule on the application within the requisite 90

day period, the proposed transaction shall stand approved.

(b) A Southern Region bank holding company having a Georgia bank subsidiary may acquire a Southern Region bank holding company that does not have a Georgia bank subsidiary or may acquire a Southern Region bank. Such Southern Region bank holding company shall notify the department at least 30 days prior to the consummation of the proposed transaction. The notification requirements of this subsection shall be satisfied by furnishing the department with a copy of the application or applications filed with the federal bank regulatory authority or authorities seeking approval for the proposed transaction.

(c) The commissioner shall not approve any application by a Southern Region bank holding company not having a Georgia bank subsidiary other than a Georgia bank acquired pursuant to Code Section 7-1-622 to acquire either a Georgia bank holding company, a Georgia bank, or a Southern Region bank holding company having a Georgia bank subsidiary unless in the Southern Region state where the Southern Region bank holding company seeking to engage in an acquisition under subsection (a) or (b) of this Code section has its principal place of business, the laws governing the acquisition of banks or bank holding companies in such state by bank holding companies having their principal place of business outside such state, that do not otherwise apply to acquisitions of banks or bank holding companies in such state by bank holding companies in such state, expressly would permit a Georgia bank holding company controlling only a Georgia bank to acquire:

(1) The Southern Region bank holding company seeking to make the proposed acquisition; and

(2) The Georgia bank holding company, Georgia bank, or Georgia bank subsidiary of the Southern Region bank holding company proposed to be acquired if the principal place of business of such Georgia bank holding company or the offices of such Georgia bank were in such state.

(d) Notwithstanding anything contained in subsection (a) or (b) of this Code section, no Georgia bank holding company or Southern Region bank holding company may:

(1) Utilize the provisions of subsection (e) of Code Section 7-1-606 to operate branches of a single bank both in this state and in any other state; or

(2) Directly or indirectly acquire a Georgia bank unless such bank has been in existence and continuously operated as a bank for a period of five years or more prior to the date of application to the commissioner for approval of such acquisition. Notwithstanding the foregoing, nothing shall prohibit a Southern Region bank holding company from acquiring all or substantially all of the shares of a Georgia bank organized solely for the purpose of facilitating the acquisition of a bank which has been in existence and continuously operated as a bank for the requisite five-year period.

7-1-622. (a) A Southern Region bank, a Southern Region bank holding company, a Georgia bank, or a Georgia bank holding company may acquire or control, and shall not cease to be a Southern Region bank, Southern Region bank holding company, Georgia bank, or Georgia bank holding company, respectively, by virtue of its acquisition or control of the institutions described in paragraphs (1) through (3) below:

(1) A bank having offices in a state other than a

Southern Region state, if such acquisition has been consummated pursuant to the provisions of Section 116 or 123 of the Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. Section 1823(f) or 1730a(m);

(2) A bank having banking offices in a state other than a Southern Region state, if such acquisition has been consummated in the regular course of securing or collecting a debt previously contracted in good faith, as provided in Section 3(a) of the federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. Section 1842(a), if the bank or bank holding company divests the securities or assets acquired within two years of the date of acquisition. A Georgia bank holding company or Georgia bank, or a Southern Region bank holding company controlling a Georgia bank, may retain such interests for up to three additional periods of one year each if the commissioner determines that the required divestiture would create undue financial difficulties for such bank or bank holding company; or

(3) A bank organized under the laws of the United States or of any state and operating under Section 25 or Section 25(a) of the Federal Reserve Act, as amended, 12 U.S.C. Section 601 or Sections 611 through 631, or a bank or bank holding company organized under the laws of a foreign country that is principally engaged in business outside the United States and which either has no banking office in the United States or has banking offices in the United States that are engaged only in business activities permissible for a bank operating under Section 25 or 25(a) of the Federal Reserve Act, as amended, 12 U.S.C. Section 601 or Sections 611 through 631.

(b) A Georgia bank holding company or a Southern

Region bank holding company having a Georgia bank subsidiary may also acquire a bank or bank holding company other than as expressly permissible under Code Section 7-1-621 or subsection (a) of this Code section for so long as:

(1) Immediately following the acquisition, the Georgia bank holding company or Southern Region bank holding company continues to qualify as such under the definitional tests provided in paragraph (8) or (12) of Code Section 7-1-620; and

(2) The Georgia bank holding company or Southern Region bank holding company complies with the requirements of subsection (a) or (b) of Code Section 7-1-621, as appropriate, which subsections shall be expressly applicable to any such acquisition.

7-1-623. (a) Except as specifically permitted under Code Section 7-1-622, no Georgia bank holding company or Southern Region bank holding company having a Georgia bank subsidiary may acquire a bank holding company which is not either a Georgia bank holding company or a Southern Region bank holding company or a bank which is not either a Georgia bank or a Southern Region bank.

(b) Except as expressly permitted by federal law, no bank holding company which is not either a Georgia bank holding company or a Southern Region bank holding company may acquire a Georgia bank holding company, a Georgia bank, or a Southern Region bank holding company controlling a Georgia bank.

(c) In the event any bank holding company makes an acquisition that is prohibited by this part, the commissioner shall require such bank holding company to divest

itself immediately of its direct or indirect ownership or control of any Georgia banks. In addition, the commissioner shall have the power to enforce any other prohibitions in this Part 19 by requiring divestitures of nonconforming banks, bank holding companies, or assets, through the imposition of fines and penalties or through the exercise of such other remedies as are provided in this chapter, including but not limited to judicial actions.

7-1-624. (a) Any Georgia bank holding company and any Southern Region bank holding company controlling a Georgia bank shall be subject to the provisions of Code Section 7-1-607 and the rules and regulations of the department applicable to bank holding companies.

(b) Any bank holding company that has a Georgia bank subsidiary that is not otherwise organized under the laws of this state or qualified to do business in this state shall qualify to do business in this state as a foreign corporation and shall advise the department of the location of its initial registered office within this state and the name of its initial registered agent at such location. Such bank holding company shall agree to be bound by all the provisions of Code Sections 7-1-605 through 7-1-608 and by the provisions of this part. Any bank holding company having a Georgia bank subsidiary shall promptly advise the department of any changes in its registered office and agent.

(c) The department may enter into cooperative and reciprocal agreements with the bank regulatory authorities of any state for the periodic examination of bank holding companies and may accept reports of examination and other records from such authorities in lieu of conducting its own examinations. The department may enter into joint actions with other regulatory bodies having

concurrent jurisdiction or may enter into such actions independently to carry out its responsibilities under this title and assure compliance with the laws of this state.

7-1-625. (a) It is the express intention of the Georgia legislature to provide a unified and orderly method of permitting limited interstate banking on a regional basis. Thus if any provision of this part establishing the regional framework within which interstate banking may occur, providing for approval and supervisory powers of the department and the commissioner or limiting expansion into this state to bank holding companies located in states satisfying the requirements of subsection (c) of Code Section 7-1-621 of this part is determined by final, nonappealable order of any Georgia or federal court of competent jurisdiction to be invalid or unconstitutional, this entire part shall be null and void and of no further force and effect from the effective date of such final determination.

(b) Nothing contained in this part shall be construed to amend or modify the provisions of any other part of this chapter governing the supervision or regulation of banks and bank holding companies, as defined therein, or the organization and powers of the department and the commissioner with respect thereto as provided in such other parts."

Section 2. This Act shall become effective on July 1, 1985; provided, however, that if any two states contiguous to this state enact legislation which would permit Georgia bank holding companies to acquire banks or bank holding companies in such states that have effective dates prior to July 1, 1985, this Act shall become effective on the later

of the effective dates set forth in such legislation, but in no event prior to January 1, 1985.

Section 3. All laws and parts of laws in conflict with this Act are repealed.

Approved April 5, 1984.

APPENDIX 2

Permissible Activities for Bank Holding Companies under Section 4(c)8 of Regulation Y November, 1984

Activities Permitted by Federal Reserve Board Regulation

1. Extensions of credit,[2] mortgage banking finance companies, consumer, sales, and commercial credit cards, factoring
2. Industrial bank, Morris Plan banks, industrial loan company
3. Servicing loans and other extensions of credit [2]
4. Trust Company [2]
5. Investment or financial advising [2]
6. Full-payout leasing of personal or real property [2]
7. Investments in community welfare projects [2]
8. Providing bookkeeping or data processing service [2]
9. Acting as insurance agent or broker primarily in connection with credit extensions [2]
10. Underwriting credit life, accident, and health insurance
11. Providing courier service [2]
12. Management consulting to all depository institutions
13. Sale at retail of money orders with a face value of not more than $1000, travelers checks, and savings bonds [1, 2, 7]
14. Performing appraisals of real estate
15. Issuance and sale of travelers checks
16. Arranging commercial real estate equity financing
17. Securities brokerage

18. Underwriting and dealing in government obligations and money market instruments
19. Foreign exchange advisory and transactional services
20. Futures commission merchant
21. Options on financial futures
22. Advice on options on bullion and foreign exchange

Activities Permitted by Federal Reserve Board Order

1. Issuance and sale of travelers checks [2, 6]
2. Buying and selling gold and silver bullion and silver coins [2, 4]
3. Issuing money orders and general purpose variable denominated payment instruments [1, 2, 4]
4. Futures commission merchant to cover gold and silver bullion and coins [2]
5. Underwriting certain federal, state, and municipal securities [1, 2]
6. Check verification [1, 2, 4]
7. Financial advice to consumers [1, 2]
8. Issuance of small denomination debt instruments [1]
9. Arranging for equity financing of real estate
10. Acting as futures commissions merchant
11. Discount brokerage
12. Operating a distressed savings and loan association
13. Operating an Article XII Investment Company
14. Executing foreign banking unsolicited purchases and sales of securities

15. Engaging in commercial banking activities abroad through a limited purpose Delaware bank
16. Performing appraisal of real estate and real estate advisor and real estate brokerage on nonresidential properties
17. Operating a Pool Reserve Plan for loss reserves of banks for loans to small businesses
18. Operating a thrift institution in Rhode Island
19. Operating a guarantee savings bank in New Hampshire
20. Offering informational advice and transactional services for foreign exchange services

Activities Denied by the Board

1. Insurance premium funding (combined sales of mutual funds and insurance)
2. Underwriting life insurance not related to credit extension
3. Sale of level-term credit extension
4. Real estate brokerage (residential)
5. Armored car
6. Land development
7. Real estate syndication
8. General management consulting
9. Property Management
10. Computer output microfilm services
11. Underwriting mortgage guaranty insurance [3]
12. Operating a savings and loan association [4, 5]
13. Operating a travel agency [4, 2]

14. Underwriting property and casualty insurance [1]
15. Underwriting home loan life mortgage insurance [1]
16. Investment note issue with transactional characteristics
17. Real estate advisory services

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[1] Added to list since January 1, 1975.

[2] Activities permissible to national banks.

[3] Board orders found these activities closely related to banking but denied proposed acquisitions as part of its "go slow" policy.

[4] To be decided on a case-by-case basis.

[5] Operating a thrift institution has been permitted by order in Rhode Island, Ohio, New Hampshire and California.

[6] Subsequently permitted by regulations.

[7] The Amount subsequently was changed to $10,000.

Source: Federal Reserve Bank of Atlanta

APPENDIX 3

Number of Interstate 4(c)8 Offices Established by Subsidiaries of Holding Companies Home Officed in a State

As of 12/82

Source: Federal Reserve Bank of Atlanta

Total: 5,500

APPENDIX 4

Total Number of Offices by Primary Activity of Interstate 4(c)8 Subsidiaries

As of 12/82

Source: Federal Reserve Bank of Atlanta

Total 5,500

APPENDIX 5

NONBANK SUBSIDIARIES

LOCATION OF OFFICES BY PRIMARY ACTIVITY AND STATE

Type of Activity	Alabama	Florida	Georgia	Kentucky	Louisiana	Mississippi	North Carolina	South Carolina	Tennessee	Virginia	Total
Mortgage Banking	7	55	29	7	12	2	32	22	38	31	235
Financial Company	94	281	205	51	151	87	311	197	117	193	1,687
Credit Cards	0	0	0	0	0	0	0	0	0	0	0
Factoring	0	0	0	0	0	0	1	0	0	0	1
Industrial Bank	0	1	9	0	0	0	*12	7	0	0	29
Servicing Loans	0	1	3	0	0	0	0	1	0	0	5
Trust Company	0	20	0	0	0	0	0	0	1	0	21
Financial Advisor	0	4	3	0	0	0	0	0	0	1	8
Leasing	0	5	1	3	1	0	8	1	3	0	22
Investment in Community Welfare	0	0	0	0	0	0	0	0	0	0	0
Data Processing	1	2	1	0	0	0	0	1	0	0	5
Insurance Agent	0	0	0	0	0	0	1	0	0	1	2
Underwriting Credit Life	4	2	0	0	0	0	1	0	0	1	8
Management Consulting	0	1	1	0	0	0	0	0	0	0	2
Money Orders, Travelers Checks	0	0	0	0	0	0	0	0	0	0	0
Check Verification	1	0	1	0	0	0	0	0	0	0	2
Audit Services	0	0	0	0	0	0	0	0	0	0	0
Total Per State	107	372	253	61	164	89	366	229	159	227	2,027

*These twelve offices belong to a nonbank subsidiary of Florida National Banks of Florida which is empowered to function as an industrial bank—however, under North Carolina state law industrial banks are not allowed—therefore, these offices do not provide all the services associated with industrial banks.

Source: Federal Reserve Bank of Atlanta

APPENDIX 6

NONBANK SUBSIDIARIES
LOCATION OF ACTIVITIES BY STATE

Type of Activity	Alabama	Florida	Georgia	Kentucky	Louisiana	Mississippi	North Carolina	South Carolina	Tennessee	Virginia	Total
Mortgage Banking	7	56	29	13	12	2	50	23	39	31	262
Financial Company	98	286	206	53	151	87	313	198	151	206	1,749
Credit Cards	0	0	0	0	0	0	0	0	0	1	1
Factoring	1	3	3	1	1	0	3	0	1	0	13
Industrial Bank	0	1	9	1	0	0	*12	7	0	0	30
Servicing Loans	11	97	44	7	23	5	59	34	9	54	343
Trust Company	0	20	1	0	0	0	0	0	2	0	23
Financial Advisor	0	16	6	1	0	0	0	0	0	3	26
Leasing	2	32	24	6	7	0	33	14	6	30	154
Investment in Community Welfare	0	0	0	0	0	0	0	0	0	0	0
Data Processing	1	2	1	0	0	0	0	1	0	1	6
Insurance Agent	62	142	128	36	110	64	235	147	74	119	1,117
Underwriting Credit Life	26	130	100	4	26	9	63	75	44	28	505
Management Consulting	0	1	1	0	0	0	0	0	0	0	2
Money Orders, Travelers Checks	8	38	4	0	0	0	0	59	34	12	155
Check Verification	1	0	1	0	0	0	1	0	0	0	3
Audit Services	0	0	0	0	0	0	0	0	0	0	0
Total Per State	217	824	557	122	330	167	769	558	360	485	4,389

*These twelve offices belong to a nonbank subsidiary of Florida National Banks of Florida which is empowered to function as an industrial bank—however, under North Carolina state law industrial banks are not allowed—therefore, these offices do not provide all the services associated with industrial banks.

Source: Federal Reserve Bank of Atlanta

APPENDIX 7

REGIONAL INTERSTATE BANKING FOR GEORGIA

THE PURPOSE OF THE PROPOSED LEGISLATION IS TO ESTABLISH A FRAMEWORK PERMITTING INTERSTATE BANKING WITHIN A DEFINED REGION CONTAINING TEN SOUTHEASTERN STATES WHICH, DUE TO HISTORICAL, CULTURAL, ECONOMIC, AND GEOGRAPHICAL INFLUENCES, ARE CLOSELY ALIGNED IN THEIR GROWTH AND DEVELOPMENT. THE RATIONALE FOR SUCH LEGISLATION IS THAT PERMITTING EXPANSION OF COMMERCIAL BANKING ACTIVITIES WITHIN A REGION OF COMMON INTEREST WILL PERMIT GEORGIA'S AND THE REGION'S ECONOMY TO RECEIVE THE BENEFITS OF HAVING MAJOR FINANCIAL INSTITUTIONS BASED WITHIN ITS BORDERS WHICH HAVE THE CAPACITY TO SERVE THE GREATER NEEDS OF A GROWING, DEVELOPING BUSINESS COMMUNITY CONTAINING REGIONAL AND NATIONAL BUSINESSES AND INDUSTRIES AND WHICH ARE SENSITIVE TO THE UNIQUE NEEDS, ATTITUDES, BUSINESS PRACTICES, AND COMMITMENTS OF BUSINESS AND COMMERCE WITHIN THE REGION. REGIONAL INTERSTATE BANKING IS A LOGICAL STEP TOWARD MAKING THE REGIONALLY ORIENTED FINANCIAL INSTITUTIONS OF OUR STATE MORE COMPETITIVE WITH THE GROWING NUMBER OF NON-BANKING PROVIDERS OF FINANCIAL SERVICES SUCH AS SEARS ROEBUCK, AMERICAN EXPRESS, AND MERRILL LYNCH WHICH ARE NOT SUBJECTED TO THE

SAME MARKET RESTRICTIONS AS COMMERCIAL BANKS. AT THE SAME TIME IT WILL ALLOW OUR INSTITUTIONS TO DEVELOP FINANCIAL AND MANAGERIAL RESOURCES ACROSS THE REGION IN A SAFE AND SOUND MANNER; BETTER POSITIONING THEMSELVES TO COMPETE EFFECTIVELY WITH THE MAJOR MONEY CENTER BANKS IN NEW YORK, CHICAGO, AND CALIFORNIA, WHICH ARE ALREADY LOCATED WITHIN THE REGION AND ENGAGING IN ALL ASPECTS OF THE BANKING BUSINESS WITH THE EXCEPTION OF DEPOSIT-TAKING ACTIVITIES. EVEN THIS LATTER ACTIVITY GOES ON THROUGH INDIRECT MEANS.

WHILE MOST ASPECTS OF INTERSTATE COMMERCE FALL WITHIN THE JURISDICTION OF THE CONGRESS, DETERMINATION OF THE BANKING STRUCTURE HAS HISTORICALLY BEEN LEFT TO THE STATES. THE PROPOSED LEGISLATION ON INTERSTATE BANKING IS SPECIFICALLY A MATTER FOR STATE CONSIDERATION UNDER THE DOUGLAS AMENDMENTS TO THE FEDERAL BANK HOLDING COMPANY ACT OF 1956 WHICH STATES THAT NO BANK HOLDING COMPANY MAY ACQUIRE A BANK ACROSS STATE LINES UNLESS THE LAWS OF THE STATE WHERE THE BANK IS LOCATED SPECIFICALLY PROVIDE FOR SUCH ACQUISITIONS. GEORGIA STATUTES CURRENTLY PERMIT INTERSTATE ACQUISITIONS BUT NOT IN A DIRECT AND AFFIRMATIVE STATEMENT AS REQUIRED UNDER THE FEDERAL LAW. THE PROPOSED LEGISLATION WILL CORRECT THAT LANGUAGE.

ANY CAREFUL CONSIDERATION OF THE EVOLUTION OF THE FINANCIAL SERVICES INDUSTRY AND THE PROSPECTS OF INTERSTATE BANKING WITH THE CONCURRENT COST/BENEFITS TO BE DERIVED MUST CONCLUDE THAT THE BENEFITS TO THE STATE'S ECONOMY AND THE DEVELOPMENT OF THE REGION ARE SIGNIFICANT AND PREDICTABLE. THE INCREASED LENDING CAPACITY AND AVAILABILITY OF SPECIALIZED FINANCIAL SERVICES WHICH CAN BE OFFERED BY LARGER, REGIONAL BANKS WILL HAVE DIRECT BENEFITS FOR THE REGION AND MAKE THE REGION EVEN MORE ATTRACTIVE TO COMMERCIAL AND INDUSTRIAL PROSPECTS SEEKING TO ESTABLISH OR RELOCATE HERE. THERE IS NO EVIDENCE TO SUPPORT THAT THE OPENING OF THE OPPORTUNITIES OF INTERSTATE BANKING FOR ALL BANKS WILL BE ADVERSE TO THE BEST INTEREST OF THOSE BANKS WHICH PREFER TO MAINTAIN A GEORGIA ORIENTATION TO THEIR OPERATION OR TO SERVE ONLY A SMALLER COMMUNITY OF THE STATE. THE COMMUNITY BANK, THE STATEWIDE ORGANIZATION, AND THE REGIONAL BANK CAN CO-EXIST AND IN FACT THE MIX OF SUCH INSTITUTIONS SERVING DIFFERENT NEEDS OF THE INDIVIDUAL AND CORPORATE CITIZENS OF OUR STATE IS DESIRABLE AND MUTUALLY BENEFICIAL TO MEMBERS OF THE BANKING COMMUNITY.

THE PROPOSED LEGISLATION WILL SET FORTH A NEW PART IN THE FINANCIAL INSTITUTIONS CODE WHICH IS CONSISTENT WITH AND

BUILDS ON THE STATE'S CURRENT BANK HOLDING COMPANY LAWS GOVERNING IN-STATE ACQUISITIONS BUT DOES NOT ALTER OR CHANGE THOSE LAWS IN ANY WAY. INTER-STATE ACQUISITIONS WOULD ONLY BE AL-LOWED THROUGH A HOLDING COMPANY, NOT THROUGH A BRANCH, THUS MAINTAINING THE LOCAL CORPORATE ENTITY AND THE BANK BEING ACQUIRED MUST BE AT LEAST FIVE YEARS OLD AS IS CURRENTLY REQUIRED IN THE CASE OF AN IN-STATE ACQUISITION. THE HOME STATE OF THE HOLDING COMPANY MUST EXPRESSLY ALLOW GEORGIA BANK HOLDING COMPANIES TO MAKE SIMILAR AC-QUISITIONS IN THAT STATE. WHILE 'ANTI-LEAPFROGGING' PROVISIONS PREVENT NON-REGION BANK HOLDING COMPANIES FROM COMING INTO GEORGIA THROUGH ACQUISI-TIONS IN ANOTHER STATE IN THE REGION, IN DEFERENCE TO BORDER STATES IN OUR REGION WHICH MIGHT DESIRE TO AUTHORIZE A LIMITED PRESENCE IN A NEIGHBORING REGION, ACQUISITIONS OUTSIDE OUR REGION ARE ALLOWED SO LONG AS AGGREGATE DE-POSITS OF ALL BANKING SUBSIDIARIES FOR THE HOLDING COMPANY WITHIN THIS REGION CONSTITUTE AT LEAST 80% OF THE HOLDING COMPANY'S TOTAL AGGREGATE DE-POSITS FOR ALL SUBSIDIARIES. AN EFFECTIVE DATE OF JULY 1, 1985, IS RECOMMENDED TO ALLOW THOSE FINANCIAL INSTITUTIONS IN-TERESTED IN EXPANDING INTERSTATE TO MAKE TIMELY, YET CONSIDERATE, FINAN-CIAL ARRANGEMENTS, TAKE OTHER NECES-

SARY CORPORATE ACTION, AND NEGOTIATE DESIRABLE MERGERS AND ACQUISITIONS AS WELL AS TO ALLOW OTHER STATES AND REGULATORY AUTHORITIES SUFFICIENT PREPARATORY TIME. HOWEVER, IN ORDER NOT TO DISADVANTAGE BANKS IN GEORGIA, IF TWO CONTIGUOUS STATES ENACTED RECIPROCAL LEGISLATION WITH AN EARLIER EFFECTIVE DATE, THIS LEGISLATION CAN BECOME EFFECTIVE AT THAT TIME BUT IN NO EVENT EARLIER THAN JANUARY 1, 1985.

PARTICULAR COMMENT SHOULD BE MADE RELATIVE TO THE SEVERABILITY CLAUSE. OPPONENTS OF REGIONAL INTERSTATE BANKING, PARTICULARLY THOSE WHO WOULD PROPOSE NATION-WIDE, NON-RECIPROCAL INTERSTATE BANKING, HAVE RAISED CONSTITUTIONAL QUESTIONS UNDER THE EQUAL PROTECTION, COMMERCE, AND INTERSTATE COMPACT CLAUSES OF THE FEDERAL CONSTITUTION. A REGIONAL PROPOSAL IN NEW ENGLAND IS BEING LITIGATED ON THESE POINTS. HOWEVER, THE NEED AND TIMING IS SUCH THAT PASSAGE OF REGIONAL INTERSTATE BANKING SHOULD NOT AWAIT THE OUTCOME OF THE NEW ENGLAND LITIGATION. GEORGIA LEGISLATION HAS BEEN DRAFTED TO ADDRESS THE CONSTITUTIONAL QUESTIONS ACCORDING TO COMPETENT LEGAL OPINION. NEVERTHELESS, TO ASSURE THAT ADVERSE RULINGS IN ANY LITIGATION DO NOT BRING ABOUT A RESULT CONTRARY TO THE INTENT OF THE GENERAL ASSEMBLY, THE PROPOSED LEGISLATION WOULD BE NULL AND VOID IF

ANY PORTION WAS FINALLY DETERMINED TO BE UNCONSTITUTIONAL.

IN CONCLUSION, INTERSTATE BANKING HAS THE PROSPECTS OF BRINGING MANY ECONOMIC BENEFITS TO THE STATE OF GEORGIA AND THE REGION DESCRIBED IN THE LEGISLATION. WHILE ITS POSITIVE INFLUENCE ON OUR ECONOMY IS PREDICTABLE, NO PERCEIVED HARM WOULD ACCRUE TO ANYONE BY ITS PASSAGE. THE ESTABLISHMENT OF A GOOD MIX OF DEPOSITORY FINANCIAL INSTITUTIONS SERVICING CONCURRENTLY THE FINANCIAL NEEDS OF THE SMALL COMMUNITY, STATEWIDE INTERESTS AND REGIONAL AND NATIONAL CUSTOMERS WOULD BE A POSITIVE DEVELOPMENT. FAILURE TO ENACT INTERSTATE BANKING IN LIGHT OF ACTIVITY IN OTHER STATES AND REGIONS ACROSS THE COUNTRY WOULD BE HARMFUL TO OUR STATE WHICH WOULD BE RELEGATED TO A SECONDARY POSITION IN THE REGION AND HAVE TO FOREVER PLAY 'CATCH-UP'. GEORGIA HAS THE OPPORTUNITY TO ENACT THE FIRST INTERSTATE BANKING LEGISLATION IN THE REGION AND THEREBY ESTABLISH THE PATTERN FOR OTHER STATES' ENACTMENTS BECAUSE OF THE REQUIREMENTS FOR RECIPROCITY. THIS STATE'S CURRENT BANK HOLDING COMPANY LAWS ARE CONSIDERED TO BE, IF NOT THE STRONGEST, ONE OF THE STRONGEST IN THE NATION. THE GENERAL ASSEMBLY SHOULD DETERMINE THE BEST BANKING STRUCTURE TO SERVE THE NEEDS OF GEORGIA AND TO ASSURE WITHIN ITS ABILITY THAT THE

MODEL FOR OTHER LEGISLATION IN THE REGION IS CONSISTENT WITH THIS STATE'S BEST INTEREST.

DEPARTMENT OF BANKING AND FINANCE
STATE OF GEORGIA

JANUARY 18, 1984

APPENDIX 8

COMPARISON OF FINANCIAL STATISTICS

Citicorp vs. Southern Region Banks

As of 6/30/84

	Total Assets	Total Deposits
Citicorp*	$143,509,000,000	$ 87,248,000,000
Chase Manhattan**	87,641,577,000	60,928,517,000
Southern States (All Banks)* **		
Alabama	$ 22,642,986,000	$ 18,460,277,000
Florida	70,277,789,000	60,598,119,000
Georgia	35,183,037,000	28,433,377,000
Kentucky	25,497,632,000	20,970,406,000
Louisiana	33,087,666,000	27,839,276,000
Mississippi	15,233,545,000	13,008,975,000
North Carolina	35,868,177,000	29,426,577,000
South Carolina	11,853,427,000	9,819,234,000
Tennessee	30,527,790,000	25,972,085,000
Virginia	34,817,163,000	28,918,795,000
Total Southern States	$330,222,757,000	$263,447,121,000

Sources: *Citicorp Quarterly Report, Aug. 1, 1984.

**Form 10-Q, The Chase Manhattan Corporation, July 1984.

***Rand McNally, International Bankers' Directory (Final Ed. 1984).

APPENDIX 9

COMPARISON OF TOTAL ASSETS

As of 12/31/83

Citicorp v. Top 25 Southern Holding Companies

	Assets
Citicorp, New York	$134,655,000,000
NCNB Corp., Charlotte, N.C.	12,807,706,000
Barnett Banks of Florida, Inc., Jacksonville	9,396,921,000
Southeast Banking Corp., Miami	8,884,000,000
Wachovia Corp., Winston-Salem, N.C.	7,850,000,000
Sovran Financial Corp., Norfolk, Va.	7,187,018,000
Citizens and Southern Georgia Corp., Atlanta	6,933,515,000
First Union Corp., Charlotte, N.C.	6,803,163,000
Sun Banks, Inc., Orlando	6,161,000,000
First Atlanta Corp.	5,761,817,000
United Virginia Bankshares, Inc., Richmond	5,414,776,000
Trust Company of Georgia, Atlanta	4,849,807,000
First Tennessee National Corp., Memphis	4,617,075,000
Bank of Virginia Co., Richmond	3,849,769,000
Dominion Bankshares Corp., Roanoke, Va.	3,825,881,000
Third National Corp., Nashville, Tenn.	3,725,260,000
AmSouth Bancorporation, Birmingham, Ala.	3,636,580,000
Florida National Banks of Florida, Jacksonville	3,549,900,000

	Assets
Flagship Banks, Inc., Miami	$ 3,534,800,000
First American Corp., Nashville, Tenn.	3,497,303,000
Atlantic Bancorporation, Jacksonville, Fla.	3,329,873,000
First Kentucky National Corp., Louisville	3,318,320,000
First Alabama Bancshares, Inc., Montgomery	3,214,303,000
SouthTrust Corp., Birmingham, Ala.	3,001,489,000
First Florida Banks, Inc., Tampa	2,797,887,000
Central Bancshares of the South, Inc., Birmingham, Ala.	2,769,159,000
TOTAL:—Southern Top 25	$130,690,322,000

APPENDIX 10

COMPARISON OF TOTAL ASSETS

As of 6/30/84

	Assets
*Largest 10 Bank Holding Companies	$604,900,000,000
(Citicorp, Bank America, Chase Manhattan, Manufacturers Hanover, J. P. Morgan, Chemical New York, Continental Illinois, First Interstate Bankcorp, Bankers Trust, Security Pacific).	
**All Banks Southern States	$330,222,757,000
(Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia).	

Sources: *American Banker, July 23, 1984
**Rand McNally, International Bankers' Directory (Final Ed. 1984)

APPENDIX 11

Excerpt from "Albania and the Balkanization of America," Speech delivered by Hans Angermeuller to the Florida Economic Club, Tallahassee, Florida March 29, 1984.

* * *

The implied purpose of the regional approach is to allow smaller banks in the region time to build up their competitiveness before true interstate banking brings larger banks into their market. A study sponsored by the Florida House of Representatives states that Florida's regional banking plan would be a good initial step toward lowering geographic restrictions. But it adds that an interim regional plan with a "national trigger" date in a few years is, on balance, the best available option.

Such a plan has been submitted in a bill introduced in the Florida legislature by State Senator Jack Gordon. The Gordon bill would strike a compromise by allowing the Florida regional banks to grow through the regional process for the next five years. Yet, during that period, bank holding companies outside the region would be permitted to acquire one Florida bank per year, providing that no Florida bank so acquired would have assets of $400 million or more.

The Gordon bill sounds like it's moving the ideas in the right direction. Naturally, we would prefer total nationwide banking by federal fiat, either immediately or over time as per the bill introduced in Congress by Senator Al D'Amato of New York. While we don't want to espouse a general rule applicable to all states, we're ready to accept a consolidation period, as Senator Gordon proposes, as a reasonable approach for the Florida market.

* * *

No. 84-363

Office - Supreme Court, U.S.
FILED
APR 3 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON THE MERITS FOR PETITIONERS

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

Of Counsel:
CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

GEORGE D. REYCRAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

JOHN BOYER
JEFFREY Q. SMITH
GREGORY SCOTT MERTZ
JOSEPH POLIZZOTTO
ALYSE GRAY

CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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I.
Introduction

The issues before the Court are sharply framed: Have respondents demonstrated that the Douglas Amendment unmistakably grants groups of states authority to pick and choose among sister states when conferring the valuable right of full-service interstate banking? And may the requirement that Congress "consent" to multi-state agreements be avoided on the theory that the New England Compact is too inconsequential to the federal union to require congressional approval? In addressing these dispositive issues, respondents fail to come to grips with the legislative and economic realities that dictate the outcome in this case.

A. Foremost among the deficiencies in respondents' argument is their failure to recognize the fundamental differences between congressional regulation of the nation's banking system and regulation by groups of states seeking to superimpose their own economic policy on broad sectors of the nation. Far from granting the states *carte blanche* authority to restructure the nation's banking system along regional lines, Congress established a system divided along state lines, except as each state acting by itself might adopt constitutional legislation permitting out-of-state institutions to enter its territory.

By adopting regional banking laws, Massachusetts, Connecticut and Rhode Island have joined together to create an exclusionary, multi-state banking region with economic consequences far different from those envisioned by Congress in 1956. And while respondents seek to dignify those discriminatory laws with the rhetoric of "states' rights," that concept provides no support for the arrangement they defend. In fact, respondents' theory would strip away the bedrock of states' rights: the *equality* of the states in the Union. Congress alone has authority to regulate commerce in a manner that injures the economic interests of any state, and Congress nowhere has given coalitions of states authority selectively to benefit or harm commerce from sister states.

Respondents ask this Court to infer, from general statutory language, authorization by Congress of regional favor-

itism that the Founding Fathers believed to be utterly incompatible with the existence of a federal union of co-equal states. The constitution forged this country into one nation, not a loose federation of states empowered to enter into parochial commercial alliances.

B. It is beyond question, as the Board found, that the statutes at issue are "discriminatory" in their purpose and effect (Pet. App. A58): they "selectively confer benefits on one or more other states and deny these same benefits to still other states" (*id.* at A56; Conn. Br. 19). As the evidence before the Board established, the statutes "create a kind of 'common market' for interstate banking that benefits some banking institutions in New England and penalizes banking institutions in the excluded states" (Pet. App. A218). As a result,

> "the Connecticut and Massachusetts legislatures, acting in concert, have decided that certain banking institutions will grow faster than would otherwise have been possible, while certain other institutions will grow more slowly, . . . the distinction being solely whether they are located within or outside of the protective geographic area." *Id.* at A219.

The adverse economic consequences for the excluded states are manifest: "Whenever any group of states decides to set up a common market and exclude some states from that market, the effect will be to penalize the business concerns in the excluded states. This in turn must have an adverse impact on the economic development of the excluded states." *Id.* That point is fully explained by the State of New York in its *amicus* brief.

The State of New York is now flanked on the East by an exclusionary common market erected in New England; simultaneously it is threatened by the erection of a new exclusionary mid-Atlantic market, which would embrace contiguous states lying to the South. *See* Citicorp Br. 6 (map). Other regionally exclusive confederations are now partitioning the United States banking market along regional lines, and all of the new confederations exclude the same money center states. Thus, this Court now

has before it " 'a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' " *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 380 (1976). While it may be common for foreign countries to confer "most favored nation" trading rights on their allies while boycotting commerce from hostile nations, we know of no precedent for the states of the union to treat each other in such a manner. Far from increasing the flow of interstate commerce, such discriminatory practices would open "the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935). It is against this economic background that the Court should evaluate respondents' argument that Congress clearly intended to validate such divisive state legislation—without a single reference to discrimination, concerted or otherwise, against disfavored sister states either in the Douglas Amendment or in its legislative history.

C. In addition to economic reality, it also is essential to consider political reality in 1956. The Congress that passed the Douglas Amendment never received any notice that the Amendment could be invoked to justify preferential trade zones, destructive of fundamental constitutional values. Respondents have not succeeded in identifying a single statement, in the statute or its history, which indicates that Congress actually considered the enormously important policy issues raised by state regional banking laws. Did Congress really mean to give combinations of states unsupervised power to curtail the competitive position of banking institutions in disfavored states by discriminatory multi-state boycotts? Did it consider and respond to the protests of disfavored states excluded from such arrangements? Not a word about this subject is mentioned.

To find implicit "consent" in this situation would violate the most fundamental principles of representative government. As the Senators and Representatives from the State of New York have explained in their *amicus* brief: "Congressmen lacking any notice that proposed legislation would countenance discrimination otherwise violative of

the Commerce Clause would not be able to . . . protest and debate proposed discriminatory legislation." *Id.* at 18.

Beyond this, Congress believed that it was curtailing regional bank acquisitions and it intended to treat each state alike, with no trace of favoritism. The Congressmen who voted for this measure would surely be astonished to see it invoked today to support the dramatic growth of regional banking through multi-state arrangements that blatantly discriminate against the economies of boycotted states.

D. Respondents' arguments also must be evaluated in light of current political reality. As the Board repeatedly has stated, "the public policy issues that are raised by the regional approach are inherently national" and should be "resolved by Congressional action" (Pet. App. A48). Thus, "if Congress wishes to support these regional arrangements, appropriately limited to a transitional period, legislation explicitly authorizing that approach should be enacted" (Pet. App. A199; *see also id.* at A204).

Recognizing that current law does not address the complex policy issues raised by groups of states enacting discriminatory regional statutes, proponents of such statutes submitted bills in Congress in 1983 and 1984 that would have authorized them. Those proposals were followed by many days of public hearings, based on explicit notice that the legislation would permit concerted regional discrimination. S. 2851, 98th Cong., 2d Sess., Title X, Sec. 1003, would have amended the Douglas Amendment to permit interstate bank acquisitions "on the basis of the location of the States involved." The purpose of the bill was clearly stated: To "remove[ ] constitutional impediments under the commerce and compact clauses for state statutes already enacted and to be enacted in the future of the kind described in sections 1002 and 1003 of the bill." S. Rep. No. 98-560, 98th Cong., 2d Sess. 49 (1984).

The House refused to enact S. 2851. Chairman Rodino explained that regional banking proposals raise serious unresolved issues of law and policy: "regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly

undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country" (Pet. Reply Br. A2-A3).

In recognition of these substantial policy concerns, Congress currently is considering several bills dealing specifically with regional banking that contain a variety of ameliorative provisions that attempt to mitigate injury to excluded states. For example, H.R. 1276, 99th Cong., 1st Sess., § 3 (Feb. 26, 1985), would allow regional banking limited strictly to a "three-year period." Moreover, institutions from "contiguous" states would be guaranteed entry into any regional compact.

Thus, Congress is now, for the first time, grappling with the policy issues raised by state-prescribed regional banking. It is sheer fantasy to suggest, as respondents do, that Congress resolved these issues thirty years ago without a word of discussion on the subject. To *imply* "consent" from the generalized language of the Douglas Amendment would moot the policy debate before Congress and write into federal law a proposal that Congress has refused to enact.

II.

Respondents Have Failed to Establish by Unmistakable Evidence That the Douglas Amendment Authorizes the States to Enact Interlocking Banking Laws That Discriminate on a Geographical Basis.

While this Court's decisions require respondents to establish unmistakable congressional authorization of legislation violative of the Commerce Clause, respondents have failed to produce even ambiguous evidence of such authorization.

A. In a brief that the Federal Reserve Board has not signed, the Solicitor General argues that the "literal text" of the Douglas Amendment authorizes groups of states to pick and choose among their sister states when granting entry (pp. 10-15). Quoting phrases from the Douglas Amendment, the Solicitor General reasons that Congress

validated *any* "statute laws" that "specifically authoriz[e]" the acquisition of a state bank by an "out-of-state bank holding company," no matter how irrational and discriminatory.

But under this Court's decisions, it is not enough that Congress authorized the states to adopt legislation dealing with interstate commerce. It is respondents' burden to show unmistakably that "Congress affirmatively contemplated *otherwise invalid* state legislation." *South Central Timber Development, Inc.* v. *Wunnicke,* — U.S. —, 104 S. Ct. 2237, 2241-42 (1984) (emphasis supplied). Thus, respondents must show "an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.' " *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 341, 343 (1982). It is *not* sufficient that Congress contemplated the enactment of state laws regulating commerce, or deferred to such laws, because such deference does "not indicate that Congress wished to remove federal constitutional constraints on such laws. The negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress deferred." *Sporhase* v. *Nebraska,* 458 U.S. 941, 960 (1982) (emphasis in original).

Thus, the Solicitor General's "literal text" argument merely begs the question before the Court: did Congress mean to defer to *invalid* state law? Under *Sporhase, New England Power* and *Wunnicke,* the controlling presumption is that Congress meant to defer *only* to state law that operates in compliance with fundamental constitutional precepts.

The Solicitor General attempts to escape the teaching of *Sporhase* by arguing that, in the present case, Congress has "expressly invite[d] the states to involve themselves in the regulation of interstate commerce" (pp. 11-12). But that also was true in *Sporhase,* which considered federal legislation that approved a host of multi-state compacts regulating interstate commerce and manifested "purposeful and continued deference to state water law by Congress." 458 U.S. 959-60 & n.19. Those federal statutes not only preserved state laws, but also provided in the broadest terms that a federal regulatory agency, "in carrying out the provisions of this Act, shall proceed in conformity with such

laws." *Id.* at 959. This language is at least as broad as the Douglas Amendment, which enables the Board to approve interstate bank acquisitions pursuant to applicable state law.

If there were any doubt about the relevance of the principles announced in *Sporhase* to the present controversy, this Court's recent decision in *Bacchus Imports, Ltd.* v. *Dias,* — U.S. —, 104 S. Ct. 3049 (1984), removed it. In that case, the Court held that even a federal constitutional provision according the states plenary regulatory power over an area of commerce cannot be construed to displace the Commerce Clause prohibition of state discrimination in favor of local industry. The Twenty-First Amendment provides that "transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Even though its sponsor said that this Amendment was intended to give "the States . . . absolute control over interstate commerce affecting intoxicating liquors" (*id.* at 3057-58), that unqualified statement of intent—which far exceeds any statement of intent concerning the Douglas Amendment—was held not to constitute a waiver of the protections of the Commerce Clause. The Court in *Bacchus* observed that reliance on broad grants of authority to the states as a waiver of the Commerce Clause is " 'an absurd oversimplification' " (*id.* at 3058), and struck down the discriminatory state legislation.

The inappropriateness of relying on congressional deference to state law as a relinquishment of Commerce Clause protections is well illustrated by the present case. Under the Solicitor General's sweeping theory, any manner of discriminatory alignment of states could be supported. The Northern states would be free to establish an interstate banking system that excludes bank holding companies located below the Mason-Dixon line. Likewise, a coalition of forty-nine states, fearing the competitive prowess of New York institutions, would be perfectly free to pass protectionist statutes freezing out New York while allowing unlimited acquisitions among themselves. These examples are, in principle, no different from the illicit type of balkan-

ization occuring across the United States under existing and proposed regional banking laws.

An additional reason for dismissing the Solicitor General's "literal text" theory is that the Board correctly found that the "Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut . . . and other New England states . . . against all other states." The Board also found that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court" (Pet. App. A65) (emphasis in original).

B. The private respondents rely on an even more nebulous source of purported congressional authorization. In their view, the fact that Congress has "balkanized" the banking market by generally prohibiting interstate bank acquisitions is a license for these states to partition the nation along regional lines, even if those lines are totally different from the lines prescribed by Congress (BNE Br. 11-16).

Respondents' argument boils down to this: Under traditional Commerce Clause principles, the states of the union must "swim together." But Congress has allowed them to swim separately. Therefore, it is perfectly proper for a group of states to join together to push another state under water. Not surprisingly, this line of argument clashes with settled legal principles.

As the Court explained in *H.P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 543 (1949), "[i]t is . . . a quite different thing if Congress . . . finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them . . . ." Accordingly, this Court has held that even discrimination mandated by federal statute, which is identical to the discrimination sought to be imposed by the states, cannot be viewed as an expression of congressional intent to permit the states to balkanize the market. *Wunnicke,* 104 S. Ct. at 2243: "The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent."

The "balkanization" that Congress imposed under the Douglas Amendment bears no relationship to the balkanization thrust upon the nation by the New England arrangement. Congress deliberately drew boundary lines at the state borders, not regional lines embracing several states. In so doing, it treated each state alike, neither discriminating against nor preferring any jurisdiction. By contrast, the New England states have, by their own action and without consent of Congress, created a multi-state common market that is open to only some states and is designed to allow regional companies to prosper at the expense of their rivals in excluded states. The New England statutes thus raise questions of policy concerning competition, concentration of resources and federalism far removed from those addressed by Congress in 1956.

It is equally unavailing for respondents to argue that the discrimination at issue is "not the creation" of the states, but is only the "residue of the congressionally-imposed discrimination that those states have refused to dissipate" (BNE Br. 28-29). Connecticut and Massachusetts have deliberately enacted statutes that extend immensely important economic benefits to institutions in preferred states, while denying those same benefits to institutions in excluded states—a discrimination based solely on geography. *See* Conn. Br. 19 (asserting that Connecticut was "justified in excluding New York"). Connecticut goes even further, imposing the penalty of divestiture on any holding company that acquires a bank outside of New England. By contrast, Congress treated all states alike, and merely gave each the ability to "permit expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 47 (1980). That the New England states have chosen to exceed their authority by jointly lifting the federal ban for some states but not for others is a clear demonstration that the states, and not Congress, have imposed the forbidden discriminatory burden. *See Bacchus Imports,* 104 S. Ct. at 3057: "Virtually every discriminatory statute allocates benefits or burdens unequally. . . . The determination of

constitutionality does not depend upon whether one focuses upon the benefited or the burdened party."

C. The vain search for unmistakable evidence of congressional intent to permit joint discrimination among states otherwise violative of the Commerce Clause has forced respondents to engage in far-ranging speculation based on irrelevant fragments from the floor debates. Never, we submit, has so little been relied on to prove so much.

The Board correctly found that "[t]he Douglas Amendment was proposed during the debate on the Senate Floor and there is no committee or other significant legislative history to clarify its meaning. There was very little dicussion of the power of the states to override the interstate banking ban imposed by the Douglas Amendment *and no discussion of the power of the states to discriminate among potential out-of-state entrants*" (Pet. App. A66) (emphasis supplied).

Respondents nevertheless rely heavily on the statement of Senator Douglas that his amendment would permit interstate expansion "only to the degree permitted by State laws" (BNE Br. 11, 18). However, this is nothing but a recognition that the Douglas Amendment would allow interstate expansion to the "degree" that the fifty states adopted "laws" permitting expansion; that is, that the amount of interstate banking would depend on the *number* of states that lifted the federal ban. He nowhere expressed the view that the states would have a license to lift the ban "partially" by permitting some states to enter and excluding others. And he certainly made no reference to multi-state regional compacts discriminating against boycotted states.

Respondents also argue that Senator Douglas' reference to the McFadden Act as an analogue to the Douglas Amendment means that states are free to discriminate among banking institutions based solely on geography (BNE Br. 20). But the McFadden Act only serves to reinforce petitioners' interpretation. As all parties agree, that Act was designed to give states control over branching within their own borders, and to give federal and state banks the same ability to branch. The McFadden Act thus serves to guarantee competitive equality, and demonstrates

that Congress meant to give the states authority over internal branching policy—not regional affairs.

Respondents' strained attempt to rely on statements of Senator Bennett concerning the Douglas Amendment are equally unavailing (SG Br. 18; BNE Br. 13-14, 29 n.89). Senator Bennett, who opposed the Douglas Amendment, envisioned that the states would be empowered to "correct" federal discrimination—not substitute an altogether new discriminatory policy inconsistent with the equal status of the states.

Finally, the passing references to "states' rights" and the "discretion" of the states that respondents cite (BNE Br. 17, 20) lend no support to their contention that Congress authorized joint geographic discrimination. Respondents do not cite any evidence that unmistakably shows that a Congress concerned about "states' rights" meant to give unbridled power to groups of states to boycott disfavored states without any federal supervision, or that Congress intended to abandon the traditional principle that discretion must be exercised within constitutional bounds.

While the Solicitor General *now* professes to see the same meaning in these fragments of legislative history that the private respondents see, he contradicts not only his client, the Board, but also his own position at the certiorari stage. The Solicitor General then correctly stated that "there was no congressional discussion of the specific types of action that the states might or might not take under the Douglas Amendment" (SG Br. in Opp. 6). *Accord Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288, 1296 (D.C. Cir. 1975).

D. Respondents also argue that the existence of certain other state laws governing interstate bank acquisitions somehow impairs petitioners' contention that the Connecticut and Massachusetts statutes are unconstitutional (BNE Br. 22-26; SG Br. 21-24). The other laws cited by respondents govern interstate bank acquisitions pursuant to criteria that do not discriminate on the basis of geography. Whether these very different types of laws are constitutional is completely immaterial here.

Moreover, while respondents attempt to argue that these geographically neutral statutes have a discriminatory effect because in-state companies are preferred to out-of-state companies, they conveniently overlook the fact that *that* consequence is imposed by Congress, and not by the states. Those states have simply lifted the federal ban on a geographically neutral basis. They have not attempted to superimpose their own brand of geographical discrimination in conflict with the pattern prescribed by Congress, as the New England states here have done.

None of the other statutes cited by respondents has ever been tested under the Commerce Clause. If such a case were to arise, it is likely that a court would apply the balancing test used to determine the lawfulness of even-handed state regulation. That approach is not permissible here, however, because the Connecticut and Massachusetts statutes *themselves* inflict geographical discrimination. *See Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 351 (1939) ("The United States could not exist as a nation if each of them were to have the power to . . . discriminate as between neighboring states in admitting articles produced therein"); *Brimmer* v. *Rebman,* 138 U.S. 78, 82 (1891) (States "may not . . . make discriminations against the products and industries of some of the states in favor of the products and industries . . . of other States").

E. Finally, respondents argue that the Board's views are entitled to judicial deference (SG Br. 24-25; BNE Br. 9 n.29). In making this argument, respondents fail to mention that the Board rejected the essential premise of their position—finding that the Douglas Amendment does "not appear on its face to authorize discrimination," and that the legislative history contains "no discussion of the power of the states to discriminate against potential out-of-state entrants" (Pet. App. A65, A66).

There is, moreover, no basis for deferring to the Board's unsupportable assertion that the Douglas Amendment constitutes a "renunciation of federal interest in regulating the interstate acquisition of banks" (*id.* at A52). The host of federal statutes and policies applicable to interstate bank

acquisitions shows that this is an erroneous overstatement. *See Lewis,* 447 U.S. at 38 & n.7. Moreover, even if Congress "renounced" its interest to the extent of deferring completely to state law, that would not show that Congress meant to waive the protections of the Commerce Clause. For when Congress defers to state law, it is presumed that it defers to "*valid* state law." *Sporhase,* 458 U.S. at 960 (emphasis in original).

III.

Respondents Have Raised No Valid Ground for Dispensing With the Unmistakable Evidence Test Here.

Respondents argue that this Court's Commerce Clause decisions, which require them to adduce unmistakable evidence of intent to permit action otherwise violative of the Commerce Clause, are "inapposite" because Congress "itself has rejected the premise of national economic unity." *See* BNE Br. 27-32; *see also* SG Br. 15. Their theory appears to be that because Congress has regulated the banking system in one way to serve a national purpose, individual states, or groups of states, are free to superimpose any divergent form of regulation they choose, no matter how discriminatory, irrational and harmful to other states. This argument is devoid of merit.

There is nothing unusual about the federal government's "balkanizing" part of the economy and, nonetheless, requiring the states to make any additional regulation of their own conform to Commerce Clause standards. For example, in *Bacchus Imports,* 104 S. Ct. at 3057-59, even though a constitutional amendment had balkanized the market by giving plenary effect to state laws forbidding the importation of liquor, ordinary Commerce Clause principles proscribing local protectionism and geographical discrimination remained fully intact. The Court explained that "because the [challenged state law] violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-First Amendment, we reject the States' . . . claim based on the Amendment." Similarly, in the present case, regional boycotts against disfavored sister states do not serve "any clear concern" of the Douglas

Amendment. And in view of the strong federal interest in effectuating the non-discrimination mandate of the Commerce Clause, that mandate is fully applicable here. *Accord Wunnicke,* 104 S. Ct. at 2243.

Thus, congressional regulation of a market—even in a discriminatory manner—does not implicitly authorize the states to superimpose their own divergent regulatory scheme. When Congress acts under the Commerce Clause, representatives from burdened states participate in a "collective decision" to permit the particular form of regulation. By contrast, when a group of states act in their own parochial self-interest to superimpose a different regime of regulation, there is a serious danger that "unrepresented interests will be adversely affected by restraints on commerce." *Wunnicke,* 104 S. Ct. at 2243.

Respondents also mistakenly suggest that petitioners rely on a "talismanic requirement" of specificity and cite *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408, 430-31 (1946), and *Western & Southern Life Ins. Co.* v. *State Board of Equalization,* 451 U.S. 648, 653 (1981), in support of their claim (BNE Br. 30). The statute involved in those cases, the McCarran-Ferguson Act, provides in the clearest possible language that the entire business of insurance is "subject to the laws of the several states," and *expressly* lifts the negative implications of the dormant Commerce Clause: "silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States." *Id.* at 429. This and other unambiguous language (*see* Pet. Reply Br. A4-A5), coupled with equally unambiguous legislative history, established that Congress, acting with "full knowledge" (328 U.S. at 430), had waived the protections of the Commerce Clause. There is no comparable evidence in the language or legislative history of the Douglas Amendment that the protections of the Commerce Clause have been waived.

Thus, *Prudential* and *Western* offer no support for respondents' claim in this case that Congress' "balkanization" of the banking industry implicitly validates discrimination by a group of states against sister states. The Solicitor General stated in his *amicus* brief in the *Wunnicke* case,

No. 82-1608, at 5-14, that "implicit approval" for states to discriminate against commerce cannot be derived from even "parallel" or "consistent" federal legislation, and explained that such a theory would be "particularly ill-suited" where Congress "has in fact given the subject . . . considerable attention, but has declined to take any action authorizing state regulation" of the type at issue. The same principle applies here, since Congress recently has focused on the subject of regional banking statutes and each time has refused to give its consent.

IV.

The Connecticut and Massachusetts Statutes Cannot Be Saved by Appeals to Preservation of Local Control Over Banking or Prevention of Concentration of Banking Resources.

Respondents further argue that the New England statutes are constitutional because they assertedly advance the federal policy of preserving "local control" over banking and prevent "undue concentration of banking resources" (BNE Br. 33-39; SG Br. 18-20; Conn. Br. 18). However, these statutes do not further either of these objectives and, in any event, cannot be saved by such an argument.

The statutes at issue here are designed for the very purpose of facilitating regional combinations of large banking institutions located far apart. The transactions at issue in this case make this point strikingly clear. Respondent CBT is the largest bank holding company in Connecticut, and its proposed merger partner, BNE, is the fourth largest banking organization in Massachusetts (Pet. App. A36). Respondent BBC is the largest commercial banking organization in all of New England, and it wishes to acquire the fourth largest banking organization in Connecticut (Pet. App. A80). Similarly, respondent HNC is the second largest banking organization in Connecticut, and it is seeking to combine with the eighth largest organization in Massachusetts (Pet. App. A72-A73).

Moreover, while the challenged statutes permit large regional combinations, New York institutions are frozen out,

regardless of their size or proximity to New England. As the *amicus* brief of the State of New York explains (pp. 2-3), "almost all of the banks in New York are the same size or smaller than the average banks located in Massachusetts and Connecticut." Indeed, as explained by the New York Bankers Association in its motion for leave to file its *amicus* brief, "[n]inety percent of the members of the Association are smaller than any of the respondent bank holding companies."

Thus, the New England statutes prescribe naked geographic criteria that exclude *all* banks in New York, while permitting large interstate combinations in New England without any pretense of preserving "local control" or avoiding undue concentration of banking resources. And they prevent Northeast, a Connecticut bank holding company of moderate size, from combining with a neighboring New York institution that is smaller than one of the private respondents. This case therefore presents an "impermissible classification based solely on residence." *Metropolitan Life Ins. Co.* v. *Ward,* No. 83-1274, slip. op. 13 (Mar. 26, 1985).

As the Board explained, these "discriminatory" laws were designed to protect New England banks from "having to compete with banks outside the region" (Pet. App. A58). In the words of one of the Connecticut legislators, the states are trying "to protect what's theirs that's within their own state" (Pet. App. A158). But instead of competing fairly on the merits with equal rules applicable to all participants, New England banks have obtained from their legislatures special interest legislation that gives them a "powerful competitive tool" withheld from institutions in excluded states such as New York (Pet. App. A219, A233-A237).

Furthermore, respondents' plea for protection against competition from New York holding companies ignores the fact that when new institutions enter a market, they do not eliminate their rivals; rather, they provide a new procompetitive presence beneficial to consumers. As Governor Rice has explained: "Survival is the result of providing good service at competitive prices and there is no evidence

that this is directly related to the size of the organization" (Pet. App. A203). *See also Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982).

In addition, it is important to recognize that the protectionist arguments advanced by respondents fly in the face of the purpose of the Equal Protection Clause. As the Court explained in *Metropolitan Life Ins. Co.*, slip op. at 12, "acceptance of [the State's] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign."

In view of these considerations, it is not surprising that respondents' "local control" and "concentration of resources" arguments were repudiated by this Court in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 42-44. In that case, the Court held that it was contrary to the Commerce Clause to exclude "out-of-state holding companies" on a blanket geographic basis. The Court explained that the proponents of the discriminatory state laws had "demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power." *Id.* at 43. The Court also rejected the argument that the discriminatory laws furthered "local control," observing that the laws do "not restrict out-of-state ownership of local bank holding companies." Moreover, the Court emphasized that such an argument is "at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its citizens from outside competition." *Id.* at 44.

Finally, respondents' arguments about preserving local control and avoiding undue concentration of resources ignore the fact that Congress has delegated to the Board the duty to regulate these matters in every bank acquisition proceeding pursuant to federally-prescribed criteria. *See* Pet. App. A41-A48; 12 U.S.C. § 1842 (a), (c). Thus, it is completely contrary to the federal legislative scheme for groups of states to engage in unsupervised boycotts of institutions in other states for the purpose of "cutting those

institutions down to size." Congress declared that competition, concentration of resources, and service to local markets would be comprehensively scrutinized by the federal administrative agency charged with regulatory responsibilities, not rival coalitions of states acting in their own selfish interest.

V.

The New England Compact Requires Congressional Approval Because It Threatens Substantial Injury to the Federal Union.

Respondents cannot seriously contend that there is no multi-state agreement in this case. The virtually simultaneous adoption of these interlocking statutes, the prescription of the same regionally discriminatory criteria, and the joint deliberation that preceded the enactment of those laws, establish an agreement beyond question. Thus, respondents are forced to argue that the compact is of such insubstantial concern to the federal union that congressional supervision may be dispensed with here (SG Br. 25-30; BNE Br. 39-47). What we have said thus far is a sufficient answer to these contentions: the New England Compact is a direct assault on excluded states, particularly the State of New York. It poses a direct and substantial injury to a principal industry of that State, and to its economy. As Chairman Rodino has explained, such a compact, unsupervised by Congress, provokes "retaliation by States in excluded regions of the country," and therefore is a threat to the harmony of our federal union (Pet. Reply Br. A3).

The "equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911). Moreover, as we have demonstrated in our opening briefs, the discriminatory compact at issue in this case is precisely the kind of agreement for parochial advantage that the Founding Fathers intended to subject to congressional scrutiny under the Compact Clause. Respondents have not even addressed that controlling constitutional history. Accordingly, respondents' contentions merit only a brief response.

Respondents rely heavily on *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (SG Br. 25-31; BNE Br. 40-42). But that case, involving a non-discriminatory compact open to all states, is clearly distinguishable on its facts and supports petitioners' analysis for the reasons explained in our opening briefs.

Respondents also rely on the irrelevant fact that the New England Compact does not set up an administrative agency to oversee regional mergers (SG Br. 27; BNE Br. 40-43). But neither the Constitution nor any of this Court's decisions limits the requirement of congressional consent to the establishment of multi-state "agencies." They require consent to the consummation of any harmful multi-state "agreement," formal or informal.

Moreover, no administrative agency is needed because the boycott is self-executing: New England states are cut into the deal while states such as New York are cut out. Thus, regardless of the presence of a multi-state agency, congressional supervision must be exercised because the reciprocal New England statutes have a harmful impact on the economy of excluded states and are a potent source of discord in the federal system. *See* New York *amicus* brief (pp. 1-4). *See also Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855) ("This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others").

Respondents also argue that this compact poses no threat to federal interests because a federal court would hold any inconsistent state law to be "preempted" (SG Br. 27; BNE Br. 43-44). That argument, however, would make the Compact Clause a superfluous restatement of the Supremacy Clause. Moreover, this Court's decisions, cited in our opening briefs, make it plain that even a *potential* inconsistency with federal policy is sufficient. The need to litigate "preemption" issues with state officials who may seek to hinder and delay interstate mergers of failing banks under 12 U.S.C. § 1823(f), and the substitution of multi-state boycotts for federal regulation of competition and resource concentration under federal criteria, are more than

sufficient to establish the requisite potential inconsistency. *See* "The Great Fall of Permanent," *New Haven Register* (Mar. 10, 1985) (*quoting* the Connecticut State Banking Commissioner: " 'A half dozen times I threatened Federal Home Loan Bank officials with a lawsuit if they tried to merge Permanent with an out-of-state institution.' ").

Respondents also claim that the New England Compact does not impair any state's sovereignty or sphere of authority (BNE Br. 44-45; SG Br. 29). This ignores the fact that injury to a state's economy is an injury to its sovereign rights. The multistate exclusionary arrangement at issue here is an assault on a principal industry of the principal excluded state—New York—and therefore is an undisguised attack on its economy. The constitution guarantees each sovereign state that no group of states will harm its economy without the supervision of the national legislature. *See Garcia* v. *Metropolitan Transit Authority*, — U.S. —, 53 U.S.L.W. 4135, 4141 (1985) ("sovereign interests" of the states are "protected by procedural safeguards" inherent in Congress' law-making functions). In this case, the excluded states have been seriously injured without being accorded the protection of Congress, and their sovereign rights have therefore been infringed.

Finally, respondents suggest that the injury suffered by excluded states is not strictly traceable to concerted action (BNE Br. 46-47; Mass. Br. 57). This argument is both irrelevant and erroneous. It is irrelevant because the Constitution requires congressional approval of *all* compacts potentially harmful to the welfare of excluded states. The argument is erroneous because the exclusive common market in this case—which allows regional companies to grow at the expense of their rivals in disfavored states—was conceived and created through concerted action. And the legislative history of the compact establishes that the states involved decided jointly to limit access to their common market. *See* Citicorp Br. 4-6, 32-33; Northeast Br. 4-5, 14-15.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

Of Counsel:
CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

GEORGE D. REYCRAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

JOHN BOYER
JEFFREY Q. SMITH
GREGORY SCOTT MERTZ
JOSEPH POLIZZOTTO
ALYSE GRAY

CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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ALEXANDER L. STEVAS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

Of Counsel:
CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

GEORGE D. REYCRAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

JOHN BOYER
JEFFREY Q. SMITH
GREGORY SCOTT MERTZ
JOSEPH POLIZZOTTO
ALYSE GRAY

CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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Supplemental Memorandum

Petitioners file this supplemental memorandum pursuant to Rule 35.5 of the Rules of this Court to draw the Court's attention to the recent decision in *Metropolitan Life Ins. Co.* v. *Ward*, No. 83-1274, slip op. (March 26, 1985), which is directly applicable to the case at bar. *Metropolitan Life*, which was handed down after petitioners filed their briefs in chief, substantially clarifies the requirements of the Equal Protection Clause in cases involving state discrimination against out-of-state corporations seeking to conduct local business. While petitioners' Commerce Clause and Compact Clause arguments are independently dispositive of this case, the Court may wish to consider the Equal Protection Clause as an additional ground for reversing the decision below.

I.

In *Metropolitan Life*, this Court examined an Alabama statute that taxed out-of-state insurance companies at a higher rate than domestic insurance companies. The Court held that Alabama's alleged interests in promoting domestic industry and encouraging in-state investment were not "legitimate under the Equal Protection Clause" when implemented by "the statute's impermissible classification based solely on residence" (slip op. 13).

In this case, petitioners challenge reciprocal Connecticut and Massachusetts statutes that permit full service banking within those states by bank holding companies located in New England, but boycott bank holding companies located in any other state. The residential classification drawn by these statutes presents a clear equal protection violation under the principles announced by this Court in *Metropolitan Life*.

First. The Connecticut and Massachusetts statutes pick and choose among identically situated institutions in sister states solely on the basis of geographical location. It is difficult to imagine a more striking example of "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent" (slip op. 8). As a former General Counsel of the Federal Reserve Board has observed:

> "What is the constitutional rationale for limiting entry to those holding companies from other New England States . . . ? A shared taste for milky clam chowder may not be sufficient to warrant discrimination against those favoring the tomato-based variety."

Hawke, *Are State Laws Permitting Interstate Banking Constitutional?* American Banker, Dec. 15, 1982, at 4 (Pet. App. A180).[1]

Second. The Massachusetts and Connecticut Acts share the same purpose and effect as Alabama's domestic preference tax—protection of the "home team." Connecticut and Massachusetts State Senators and Representatives stated that the legislation was intended to give "[o]ur banks . . . the space to grow," and "to protect what's theirs that's within their own state." The laws were designed to "give our banks . . . time to merge . . . and get as large as possible so we can thwart any intervention," particularly from "large New York banks" (Pet. App. A189; A158; A159; *see also* Pet. App. A157-A160). Even respondents acknowledge that the challenged statutes have the "goal of strengthening . . . indigenous entities" (BNE Br. 35; *see also* Conn. Br. 18; Mass. Br. 33-34).

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[1] *See also* Note, *Regional Banking Statutes and the Equal Protection Clause,* 84 Colum. L. Rev. 2025 (1984) (concluding that regionally restrictive interstate banking laws plainly violate the Equal Protection Clause).

Third. The Connecticut and Massachusetts Acts cannot be saved by the Douglas Amendment. As this Court held in *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969), "Congress may not authorize the States to violate the Equal Protection Clause." Beyond this, the Douglas Amendment treats all states *equally and nondiscriminatorily* and regulates the interstate acquisition of banks in the *national interest.* By contrast, the Connecticut and Massachusetts Acts specifically discriminate against certain states in order to protect local interests.

Fourth. Respondents have suggested that the Connecticut and Massachusetts laws are designed in part to insure that the capital needs of those localities are met. The Court flatly rejected the same argument in *Metropolitan Life,* however, holding that increasing a locality's access to capital is not a legitimate purpose when advanced in a "plainly discriminatory manner" (slip op. 13).

II.

This Court has discretion to consider the equal protection question even though it was not presented in the petition for certiorari. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp,* 104 S. Ct. 2694, 2699-700 (1984); *Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247, 255-57 (1981); *Peters* v. *Kiff,* 407 U.S. 493, 495 (1972); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 319-21 (1971); R. Stern & E. Gressman, *Supreme Court Practice* 458-61 (5th ed. 1978). The equal protection issue was presented in both proceedings below (*e.g.,* Ct. App. JA290-300; JA 328-472; JA1200-19; JA1438-39; JA1477-86; JA2153-56; Ct. App. Conn. Br. 31-37; Ct. App. CBT Br. 42-47; Ct. App. HNC Br. 30-32). Both the Board and the Court of Appeals discussed and decided the constitutionality

of the Connecticut and Massachusetts Acts under the Equal Protection Clause (Pet. App. A52-A55; A32-A33).

The Court of Appeals upheld the discriminatory statutes on the ground that "the . . . statutes appear to be designed to foster banking and related activities in these and in neighboring New England states" (Pet. App. A33). The goal of "fostering" parochial commercial interests by discriminating on the basis of residence is precisely what this Court held invalid in *Metropolitan Life*.

III.

In light of the recent clarification of equal protection law in *Metropolitan Life*, the Court may wish to correct the plain error in the decision below and declare the Connecticut and Massachusetts laws to be inconsistent with the Equal Protection Clause. In view of the importance to the nation of obtaining an authoritative resolution of the constitutional validity of regional banking legislation and avoiding additional burdensome litigation, a decision by this Court addressing the Equal Protection Clause, along with the Commerce Clause and the Compact Clause, would be consistent with the public interest. If the Court wishes to have the equal protection issue raised by motion to amend the petition for certiorari to include an additional question, petitioners request the Court to treat this memorandum as such a motion. The Court may also wish to direct the parties to file concise supplemental briefs limited to the equal protection issue.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record for Petitioner Citicorp

GEORGE D. REYCRAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000
Counsel of Record for Petitioners Northeast Bancorp, Inc. and Union Trust Company

Of Counsel:
CARL D. LOBELL
JAMES W. QUINN
JAY N. FASTOW
LAWRENCE E. ELDER
STEPHEN A. RADIN

JOHN BOYER
JEFFREY Q. SMITH
GREGORY SCOTT MERTZ
JOSEPH POLIZZOTTO
ALYSE GRAY

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Counsel for Petitioner Citicorp

CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
Counsel for Petitioners Northeast Bancorp, Inc. and Union Trust Company

ROBERT L. STERN
STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

LAURENCE H. TRIBE
Counsel of Record
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
Counsel for Intervenor-Respondent Bank of New England Corporation

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Counsel for Intervenor-Respondent Hartford National Corporation

MARK A. WEISS
STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for Intervenor-Respondent Bank of Boston Corporation

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

This brief is filed pursuant to Supreme Court Rule 35.5 in light of this Court's decision in *Metropolitan Life Ins. Co.* v. *Ward*, 53 U.S.L.W. 4399 (U.S. March 26, 1985), handed down after the filing of the private respondents' brief. Petitioners would use *Metropolitan Life* in a twelfth-hour attempt to

resurrect the equal protection claim that both the Federal Reserve Board and the Court of Appeals rejected and that petitioners abandoned when they elected not to raise it in their petition for certiorari.[1] This Court's prior decisions make clear that, even in light of the recent decision in *Metropolitan Life*, this is not a case in which the Court should exercise its discretion to entertain such a belated claim—whether to dispose of that claim here, or to invite the Second Circuit to reconsider the equal protection holding that it rendered upon an ample record and after plenary briefing and argument, on the basis of that court's conjecture as to the meaning of this Court's *Metropolitan Life* holding.[2] In any event, there is no

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1 As petitioners concede (Reply Br. 3), equal protection arguments were not presented in the Petition for Certiorari, nor were such issues addressed by petitioners in their principal Briefs on the Merits. Rule 21.1(a) of this Court's Rules provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered." *See also* Rule 34.1(a). This rule will be disregarded, in Justice Powell's words, "only in the most exceptional cases." *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976). *See also White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214 n.12 (1983).

2 A remand to the Court of Appeals for reconsideration of the abandoned equal protection issue would be the least appropriate disposition of this case, not only because this Court is in a better position to apply its *Metropolitan Life* reasoning to these facts, but also because the several interstate bank mergers challenged here have already been too long delayed. Sensitivity to the need for prompt resolution of this matter requires that the equal protection issue either be dismissed as not properly before the Court or resolved now. That the issue merits no further attention in this case is plain. Petitioners' assertion that *Metropolitan Life* sheds new light on the requirements of the Equal Protection Clause (Supp. Mem. 1, 4) ascribes a significance to that decision which this Court itself expressly eschewed: the Court repeatedly emphasized in *Metropolitan Life* that it was merely applying the teachings of *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981). See *Metropolitan Life Ins. Co.* v. *Ward*, 53 U.S.L.W. at 4401, 4402. Moreover, the Court in the past has not deemed it appropriate to do what petitioners now ask, even when an intervening decision has worked an indisputably substantial change in the law. *See, e.g.*, *United States* v. *Leon*, 104 S.Ct. 3405, 3412 (1984) (declining to address an issue decided below but not raised in the petition for certiorari, despite an intervening decision significantly altering the applicable law).

substantive merit to petitioners' equal protection argument in the circumstances of this case, which are entirely different from those in *Metropolitan Life*.

Metropolitan Life is wholly inapposite here because the exclusion complained of by petitioners was not imposed by any state. New York banking organizations are excluded from Massachusetts and Connecticut because of a *congressional* decision to adopt a national policy favoring local control of banking, and to pursue that policy by forbidding interstate bank acquisitions except to the degree that states determine to permit them. As demonstrated in our principal brief, Congress in the Douglas Amendment affirmatively determined that this repudiation of traditional norms favoring a unitary market was proper as a matter of national policy in the area of interstate bank acquisitions unless and except to the extent that states determine otherwise.[3]

Metropolitan Life, by contrast, did not involve any such affirmative congressional determination to favor provision of services by in-state companies. Neither the majority nor the dissenting opinion in *Metropolitan Life* leaves any doubt that Congress might, if it wished, have imposed measures operating to favor local companies. 53 U.S.L.W. at 4402 n.8 (opinion of the Court); *id.* at 4407 (O'Connor, J., dissenting). In fact, the majority made clear that *Metropolitan Life* would have been an entirely different case if affirmative congressional action had been involved. 53 U.S.L.W. at 4402 n.8.[4]

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3 There can be no doubt in the circumstances of this case that Congress adopted a policy in favor of balkanization of the national market. See Priv. Resp. Br. 11-27. *See also Town of Hallie* v. *City of Eau Claire*, 53 U.S.L.W. 4418, 4420 (U.S. March 27, 1985) (focusing upon the effects that "logically would result" from legislation granting "broad authority to regulate").

4 In *Metropolitan Life*, the Court found that Congress in the McCarran-Ferguson Act merely intended to restore to the states the power they possessed prior to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and that Congress had not approved any discriminatory action designed by states solely to favor in-state interests and disadvantage

When Congress adopts a policy in favor of local interests—as it unquestionably did in the Douglas Amendment—it is a *national* policy enacted by a *national* body. Such federal legislation simply *cannot* constitute "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent" 53 U.S.L.W. at 4401, because it is imposed not by one state against unrepresented outsiders, but by the national legislature where residents and outsiders are both represented. For this reason, the Commerce Clause grants Congress the power to enact legislation and programs that draw distinctions along regional or state lines or, without such explicit line-drawing, to regulate commerce in ways that produce equivalent effects.[5] This Court has previously sustained such explicit or implicit congressional line-drawing even in the face of charges that Congress' geographic discrimination violated the Due Process Clause of the fifth amendment.[6] As the Court stated in *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950), "Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions."

In fact, *Central Roig* presented the Court with a situation closely analogous to the present case. There, in an effort to rationalize "the mischievous fluctuations of a free sugar market," Congress had enacted legislation dividing the country into five sugar-producing areas. To each area the legislation allotted an annual quota of sugar, specifying the maximum

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out-of-state companies. *See* 53 U.S.L.W. at 4402 n.8. The dissenting opinion disagreed with this interpretation of Congress' intent, believing that the McCarran-Ferguson Act did authorize such discriminatory state taxation with respect to insurance. See 53 U.S.L.W. at 4402 n.8. (O'Connor, J., dissenting).

5 *Cf.*, *e.g.*, *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, 325-28 (1917) (Congress in exercise of its Commerce Clause power may permit individual states to restrict the movement of liquor from one state to another); *Kentucky Whip & Collar Co.* v. *Illinois Central R.R. Co.*, 299 U.S. 334, 351-52 (1937) (same with respect to interstate movement of convict-made goods).

6 *See*, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 331-33 (1981); *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939).

number of tons that might be marketed from that area.[7] After rejecting a Puerto Rico refining company's Commerce Clause challenge to the statute,[8] the Court proceeded to reject as well the company's claim that the discriminations built into the statute violated the fifth amendment's Due Process Clause:

> [I]t is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. *This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons.* This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.

338 U.S. at 617-18 (emphasis added). Thus, the Court in *Central Roig* concluded that it did not offend the fifth amendment for Congress to balkanize the national market so as to favor some areas over others. Indeed, the Court stressed that, if such claims of impermissible geographic discrimination in Congress' regulation of commerce had ever "carried plausibility," they were "belated in view of the unfolding of the Commerce Clause" in the Court's decisions. 338 U.S. at 617.[9]

Although the *Metropolitan Life* dissent expressed concern that the Court's decision could have far-reaching effects, all the Court purported to hold in that case was that, given a

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7 The quotas were anything but uniform; they were based on "past marketings" from each area, among other factors. 338 U.S. at 608.

8 The Court held that the Commerce Clause does not require geographic uniformity. 338 U.S. at 618.

9 The Court recently relied on *Central Roig* in holding that a claim of arbitrariness under the fifth amendment "cannot rest solely on a statute's lack of uniform geographic impact." *Hodel* v. *Indiana*, *supra*, 452 U.S. at 332. The *Hodel* Court also relied on *Currin* v. *Wallace*, *supra*, which similarly rejected a claim that a federal statute imposing geographic inequalities was impermissibly discriminatory under the fifth amendment's equal protection guarantee. It is therefore irrelevant that *Central Roig* was decided before *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

"state's natural inclination . . . to prefer domestic business over foreign," the "promotion of domestic business by discriminating against nonresident competitors is not a legitimate *state* purpose." 53 U.S.L.W. at 4402 (emphasis added).[10] In the case at hand, it is Congress itself, *not* any state or states, that has created a regime explicitly favoring local control and local interests. And the Douglas Amendment, unlike the Alabama law in *Metropolitan Life*, was designed *not* to give a parochial and self-interested advantage to the enacting jurisdiction's own residents at the expense of outsiders, but to keep control of credit diffused and responsive to community needs—precisely the kind of principled and neutral purpose Congress is manifestly empowered under the Commerce Clause to pursue by such means, including delegation to state legislatures, as it deems wise.[11]

In short, this case does not even resemble one in which Congress has sought to empower the states to violate the Equal Protection Clause. *Cf. Shapiro* v. *Thompson*, 394 U.S. 618, 641 (1969) (*discussed in* Supp. Mem. 3). Rather, Congress itself consciously adopted a policy in favor of local control—action that clearly does *not* violate equal protection principles—and imposed, as a matter of federal law, the exclusionary barrier that forms the heart of petitioners' complaint.[12] The Massachusetts and Connecticut Acts serve merely to lift that exclusionary federal barrier to a degree, as Congress expressly permitted. Thus, the continued exclusion from Massachusetts and Connecticut of some out-of-state banking organizations is the result not of any state action but of what Congress itself did in the Douglas Amendment.[13] In these circumstances, *Metropolitan Life* is wholly inapposite.

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10 The Court repeatedly emphasized the narrowness of its holding. *Id.* at 4400, 4401, 4402 n.10.

11 See Priv. Resp. Br. 14-16.

12 See Priv. Resp. Br. 11-16.

13 Even if such exclusion were viewed as the result of the states' actions, it is the sort of exclusion that Congress itself clearly could have

Even if this case were deemed to involve a form of state-imposed discrimination, there is no basis for any finding that the Massachusetts and Connecticut Acts violate the Equal Protection Clause.

In *Metropolitan Life*, the Court held that Alabama's domestic preference tax "erected barriers to foreign companies" that wished to do business in the state. In the Court's view, the Alabama tax gave "the 'home team' an advantage by burdening *all* foreign corporations seeking to do business within the State . . . ." 53 U.S.L.W. at 4401 (emphasis in original). In stark contrast, the Massachusetts and Connecticut Acts plainly do not erect any new barrier or impose any new burden with respect to out-of-state companies; instead, they partially lift the barrier to interstate acquisitions imposed by the Douglas Amendment and thereby *expose* "home team" banking organizations for the first time to competition on equal terms from some out-of-state bank holding companies.[14]

To be sure, the Massachusetts and Connecticut Acts could be said to favor one group of outsiders over another, but that is true of much state legislation, including state statutes under the Douglas Amendment that are based on "grandfather" status or that impose reciprocity requirements.[15] Nowhere in *Metropoli-*

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effected directly under its Commerce Clause power without violating equal protection norms. Thus there likewise is no equal protection violation where states, pursuant to the express congressional grant of authority contained in the Douglas Amendment, have undertaken such action. *See* Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387, 400-01, 412 & n.114 (1983).

14 Thus, the commerce that Connecticut and Massachusetts are supposed to have "burdened" is interstate commerce in bank acquisitions that would not have existed *at all* if those states had not lifted the pre-existing federal barrier. *See Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976) (Stevens, J., concurring) ("It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to [state legislation]").

15 See Priv. Resp. Br. 23 & n.69.

tan Life did the Court condemn this form of legislative classification as impermissible under the Equal Protection Clause. Rather, this Court held invalid only a purpose that it deemed "purely and *completely* discriminatory"—a design "*only* to favor domestic industry within the state. . . ." 53 U.S.L.W. at 4401 (emphasis added).[16]

As both the Federal Reserve Board and the Court of Appeals determined, Massachusetts and Connecticut had legitimate reasons for deciding to remove the Douglas Amendment's general ban on interstate bank acquisitions for some but not all out-of-state banking organizations. The Board found the Acts "rationally related to . . . the purposes of . . . avoiding an undue concentration of resources, maintaining the responsiveness of the banking system to local credit needs and providing an opportunity for a limited interstate banking experiment." Pet. App. A54, A75. The Court of Appeals similarly concluded that the Acts' regional approach to interstate bank acquisitions was "designed to foster banking and related activities" in New England and evinced a concern that allowing unlimited interstate acquisitions would permit large, money-center institutions to dominate banking activity to the detriment of local communities and their credit needs. Pet. App. A33.[17] Petitioners do not suggest, nor could it be argued, that

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16 Thus, the Equal Protection Clause's traditional concern—that unrepresented interests not suffer at the hands of a state legislature—is inapplicable here: the Massachusetts and Connecticut Acts do not favor residents *over* non-residents but instead distinguish *among* non-residents. See Priv. Resp. Br. 24 n.73. *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976). It is therefore especially noteworthy that this Court in *Western & Southern, supra*, expressly upheld over equal protection attack state legislation discriminating among non-residents based on their state of residence while invalidating in *Metropolitan Life* a decision to favor residents over non-residents.

17 This Court itself has previously endorsed the propriety and importance of maintaining a financial system responsive to community needs. *See Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). *See also Edgar* v. *MITE Corp.*, 457 U.S. 624, 646 (1982) (Powell, J., concurring in part) (noting state's legitimate interest in protecting—on behalf of local communities—regionally based institutions from acquisition by larger, out-of-state corporations).

these findings and conclusions are insufficiently supported by the record below.[18]

The Massachusetts and Connecticut Acts involve legitimate state experiments with interstate banking.[19] These states have sought "to assess the impact of out-of-state entry" through a limited exception to the Douglas Amendment's general prohibition.[20] It was certainly foreseeable when the Douglas Amendment was passed that such an experiment might operate on a regional basis and exclude bank holding companies based in money centers such as New York: the "legislative and economic realities" (Reply Br. 1, 3) of 1956 included Senator Douglas' undisguised alarm at the growing power of such financial giants as Citibank—predecessor and chief subsidiary of petitioner Citicorp—and *amicus* Chase Manhattan.[21] In their experiments, Connecticut and Massachusetts pursue no parochial program of domestic protectionism, but labor to create a regional banking system strong enough to weather the coming storm of full interstate banking, yet responsive to the needs of local communities.[22]

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18 *See* JA (2d Cir.) 1208-19, 1402-07, 2153-56, 2184-2215.

19 *Cf. Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. at 817 (Stevens, J., concurring) (Commerce Clause does not bar state "experiment[ation] with different methods of encouraging local enterprise without providing like encouragement to out-of-state competitors").

20 See Priv. Resp. Br. 37.

21 See Pet. App. A12-15.

22 See Priv. Resp. Br. 35-36 & nn.105-106, 109-10. The aim of both the Douglas Amendment (Priv. Resp. Br. 14-16) and the challenged Acts (*id.* at 35-36 & nn.105-06, 38) to preserve some degree of local control over credit has absolutely nothing in common with the "encouragement of capital investment in the Alabama assets and governmental securities specified in the statute" struck down in *Metropolitan Life*, 53 U.S.L.W. at 4402. The Acts challenged here do not seek to compel foreign investment in local assets and state securities by the carrot-and-stick application of a discriminatory tax; they seek, rather, to maintain an indigenous, locally-controlled financial system capable of meeting local needs precisely so that resident businesses and consumers will *not* have to face the burden of attracting out-of-state credit and capital.

Indeed, the Connecticut and Massachusetts Acts unquestionably effectuate congressional policy rather than merely advance parochial state interests: the Acts seek the very ends Congress endorsed in the Douglas Amendment.[23] For, in empowering the states to lift the federal barrier to interstate acquisitions as they saw fit, Congress sought to avoid "undue concentration of banking and financial power" [24] and to prevent "the big holding companies" from "keep[ing] far ahead of the rest of the pack" in "unequal races." [25] The challenged Acts pursue these precise goals. See Priv. Resp. Br. Part II.[26] Even if they did so pursuant to a federal statutory authorization that did not "expressly state" in its text or "its legislative history that it intends for the delegated action to have anticompetitive effects," *Town of Hallie* v. *City of Eau Claire*, 53 U.S.L.W. 4418, 4421 (U.S. March 27, 1985), that omission would be as immaterial here as it was in *Town of Hallie*. In that case, which was decided after respondents' briefs on the

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23 Petitioners' sudden injection of this Court's twenty-first amendment decision in *Bacchus Imports, Ltd.* v. *Dias*, 104 S.Ct. 3049 (1984), is thus doubly beside the point—not only because that Amendment is far afield from the problem posed here, but also because *Bacchus Imports* rested on the proposition that the twenty-first amendment's concerns about state temperance policy bore no relation to the challenged statute's admitted purpose of "favor[ing] local liquor industries by erecting barriers to competition," *id.* at 3058. Moreover, in *Bacchus Imports*, this Court had to reconcile the Commerce Clause and the twenty-first amendment; the present case requires no such judicial reconciliation, for Congress displaced the norms of the dormant Commerce Clause when it enacted the Douglas Amendment. See Priv. Resp. Br. 11-39.

24 See Priv. Resp. Br. 15 & n.40.

25 See Priv. Resp. Br. 16 n.42.

26 Petitioners' contention that those concerns should be guarded solely by the Federal Reserve Board when it reviews proposed acquisitions (Reply Br. 17-18) ignores the fact that in 1956 Congress rejected a Senate Committee proposal that would have adopted just such a policy (see Priv. Resp. Br. 17) and opted instead to suppress interstate commerce in acquisitions while authorizing the states to lift that federal burden. Petitioners thereby attempt to re-fight a legislative battle that they lost nearly three decades ago.

merits were submitted, this Court unanimously declared that any demand for the very sort of specificity that petitioners would require in this case "embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind." *Id.*[27]

In sum, *Metropolitan Life*, which involved a hypothesized state purpose unconnected to any national policy—the purpose of favoring in-state companies "at the expense of" non-residents, 53 U.S.L.W. at 4402 n.10—cannot be mechanically extended to the entirely different context of this case. For here states have *opened* their borders to increased out-of-state competition; and they have done so while drawing lines that reasonably reflect the very considerations Congress itself weighed when it delegated to the states the discretion to decide how much additional competition to invite. In the framework of a federal statute designed to permit states to calibrate "the degree" of additional competition (Priv. Resp. Br. 18), the line drawn by Connecticut and Massachusetts is surely a rational one. For a court to condemn it as impermissible would transform *Metropolitan Life* into a veritable engine of destruction for economic regulation.

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27 The *Hallie* test is whether the Acts are a "foreseeable result of empowering," *id.* at 4420, the states to control bank acquisitions within their borders. Despite petitioners' remarkable notion that Congress in 1956 had heard not "a word of discussion on the subject" (Reply Br. 5), the fact is that Congress in that year had heard testimony by bank officials advocating a federally-mandated regional approach to bank acquisitions (see Priv. Resp. Br. 21 & nn.60 & 64), and had determined instead to leave the choice between that approach and others to state "discretion" (see Priv. Resp. Br. 20 & n.59), without in any way qualifying the breadth of its delegation to the states or negating the "foreseeable" and "logical[]" (*Town of Hallie*, 53 U.S.L.W. at 4420) results of that delegation—state-structured regional experimentation.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
Counsel for Intervenor-Respondent Bank of New England Corporation

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Counsel for Intervenor-Respondent Hartford National Corporation

MARK A. WEISS
STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for Intervenor-Respondent Bank of Boston Corporation

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